in *Gaffney* that such "partisan fairness" is a legitimate legislative purpose in the consideration and adoption of a representative districting plan. *See Gaffney*, 412 U.S. at 753.

Different political scientists, analysts, or, advocates may dispute how or which election results best represent partisan strength in Texas, but no amount of statistical furor can hide the simple fact that in 2002 the Republican Party was the majority party in Texas under any rational analysis. In 2002, its candidates received a majority of the Texas votes but a minority of Texas congressional seats. In *Reynolds v. Sims*, this Court observed that "[l]ogically, in a society ostensibly grounded on representative government, it would seem reasonable that the majority of the people of a state could elect a majority of that state's legislators." *Reynolds v.* Sims, 377 U.S. 533, 565 (1964). Logically in Texas, therefore, it would seem reasonable that the majority of the people of the state should be able to elect a majority of the state's congressional delegation. The Texas legislature, acting in its sovereign capacity, adopted a new plan for the 2004 elections permitting this to happen for the first time in more than a decade of congressional elections.

Amici also explain additional considerations that are present when reviewing state legislative rather than congressional plans. Most importantly, self-perpetuation of power is a significant issue for legislative redistricting, but not congressional. There is also relief available to parties affected by congressional gerrymandering, either in the form of congressional statutory action specifically limiting gerrymandering or the passing of criteria that would have such effect. This relief does not apply to state legislative plans. Also, there are states in which congressional districts have been created that are little more than amalgamations of census blocks without any underlying recognizable geographic components. The existing statutory requirement for "congressional districts," set forth at 2 U.S.C. §2c, provides an alternative statutory basis for this Court to invalidate such plans without this, or other, Courts having to decide the unquestionably contentious question of how much political unfairness is too much in an equal protection analytical framework.

ARGUMENT

I. THE APPROPRIATE TRANSLATION OF VOTES INTO SEATS HISTORICALLY HAS BEEN ASSESSED BY POLITICAL SCIENTISTS USING THE "SEATS-VOTES CURVE"

A. THE RELATIONSHIP OF VOTES RECEIVED TO SEATS WON

From the early days of the American Republic, most elections to the U.S. House of Representatives have been held under districting plans.[2] One of the purposes of holding elections by district is to provide for a more equitable distribution of the votes cast for candidates in comparison to an at-large system.

> *The very essence of districting is to produce a different - a more "politically fair" - result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats.*

Gaffney v. Cummings, 412 U.S. 735, 753 (1973). While the dynamics of a districting system, especially a single member system like that used for Congress, may produce a more "politically fair" result, they also present some analytical problems. The main dynamic of concern here relates to the conversion of votes into seats.

The seminal article on the topic of seats and votes in American elections was published in 1973 by Edward Tufte[3] who summarized part of the perceptual problem as follows:

> *Arrangements for translating votes into legislative seats almost always work to benefit the party winning the largest share of the votes. That the politically rich get richer has infuriated the partisans of minority parties, encouraged those favoring parliamentary rule, and, finally, bemused a variety of statisticians and political scientists who have tried to develop*

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2. Robert G. Dixon, Jr., *Democratic Representation: Reapportionment in Law and Politics* 59 (1968); Rosemarie Zagarri, *The Politics of Size: Representation in the United States, 1776-1850*, at 107-18 (1987).

3. Edward R. Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*, 67 Am. Pol. Sci. Rev. 540 (1973) (hereinafter "Tufte"). *See also* the earlier work of M.G. Kendall & A. Stuart, *The Law of Cubic Proportion in Electoral Results*, 1 Brit. J. Soc. 183 (1950).

parsimonious descriptions and explanations of the inflation of the legislative power of the victorious party.[4]

Tufte reviewed election results in terms of votes and seats for 132 elections in six two-party systems, including congressional and state legislative elections, and assessed the political consequences "over the years for a variety of electoral systems." Tufte at 540. He concluded that some of the results "appear useful for evaluating the consequences of redistricting plans, and might well be used for that purpose by the courts." *Id.* His study identified the following four characteristics of most two-party districting systems: 1) "As the party's share of the vote increases, its share of the seats also increases in a fairly regular fashion"; 2) "The party that receives a majority of the votes usually receives a majority of parliamentary seats"; 3) "A party that wins a majority of votes generally wins an even larger majority of seats"; and 4) "In most elections (100 percent in this series), the winning party receives less than 65 percent of the votes." *Id.*

This relationship of the *votes received* to *seats won* has been depicted graphically by a "seats-votes curve" (sometimes called an "S-curve" given its shape). In a single member district electoral system, the translation of votes into seats is not proportional or linear. The nonlinear relationship as described by Tufte is a well documented regularity in single member district systems like the one used for the U.S. House of Representatives.[5]

The relationship of votes to seats is a key concept in understanding the dynamics of a districting system, and the translation of votes into seats is a key concern of both line-drawers and plan reviewers. As such, the seats-votes curve can be of assistance in the evaluation of the political impacts of redistricting plans.

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4. Tufte. By giving the "same reward to parties with 1 percent margins as to those with 50 percent margins ... the votes a party obtains beyond the minimum requirement are, in a sense, wasted." Douglas Rae, *The Political Consequences of Electoral Laws* 27 (1967).

5. *See* Rein Taagepera & Matthew S. Shugart, *Seats and Votes: The Effects and Determinants of Electoral Systems* (1989); Peter J. Taylor *et al.*, *The Geography of Representation: A Review of Recent Findings in Electoral Laws and Their Political Consequences* 184 (Bernard Grofman & Arend Lijphart eds., 1986); David M. Farrell, *Electoral Systems: A Comparative Introduction* (2001).

From the layperson's perspective, it can be hard to dispel the concept of strict proportionality,[6] which actually has little application in districting. In our majoritarian two-party system, most districted elections include candidates from the two major parties. Based upon the seats-votes curve, if Party A receives 20% of the vote (and the other party then receives 80%), Party A can "expect" to receive a very small proportion of the seats (about 7 seats in a body the size of the U.S. House (435 seats)). But if Party A increases its vote share by 1 percentage point (to 21 percent of the vote), the gain in seats will not be proportional and the party may be "expected" to gain only one seat. When the two parties are more competitive with one another (*i.e.*, they both can command about 50% of the vote), then small increases in their vote totals nationwide have a disproportionate effect on the seats won.

The area of most concern for this type of analysis in American politics is the region of the seats-votes relationship where each party is potentially competitive in a broad sense, from about 35 or 40% to about 60 or 65% of the aggregate vote. This is the general range of election results in our competitive two-party system. This is also the area of the curve that is mostly linear, facilitating analysis. Applying statistical analysis to this linear framework, Tufte's study showed that the *slope*[7] of the line in this region usually had a value between 2 and 3.[8]

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6. That is, a party that receives X% of the vote should also win X% of the seats in the legislative chamber, representing a 1 to 1 relationship between votes and seats.

7. Lines are a collection of data pairs, one data item for the X, or horizontal, axis and one data item for the Y, or vertical, axis. The slope of a line is merely the degree to which a change in the data item for one axis is followed by a change in the value for the other axis. In this case it would mean the degree to which a change in the percentage of the Votes (horizontal axis) is followed by a change in the percentage of the Seats (vertical axis).

8. Tufte found different slopes for different periods of time for U.S. House elections. A slope of 3 is the foundation for the generalized "cube law" which is the product of early research on the topic. "Indeed, it is generally believed that single-member plurality elections produce disproportions of cubic proportions," Douglas Rae, *The Political Consequences of Electoral Laws* 27 (1967) (citing M.G. Kendall & A. Stuart, *The Law of Cubic Proportion in Electoral Results*, 1 Brit. J. Soc. 183 (1950)).

(Cont'd)

A "value" of 3 means that if a party manages to pick up an extra 1% of the vote nationwide, they would be expected to win approximately an additional 3% of the seats in the chamber.[9] This is "*the inflation of the legislative power*" to which Tufte refers, sometimes referred to as the "seat bonus."[10]

Under the single-member districting scheme used in 43 of the 50 states for congressional elections, the political party receiving more than 50% of all the votes cast statewide usually wins more than 50% of the seats (*see* Charts TX-22, 23, and 24 in the Appendix). Thus, using the seats-votes curve with a value of 3, if a political party were to receive 55% of the votes, it would be expected to receive about 65% of the seats. Similarly, if a political party were to receive 60% of the votes, it would be expected to win about 77% of the seats.[11] With 65% of the votes, the expected percentage of seats won would be about 86%.[12]

The accompanying graphic (*see* Chart TX-1 in the Appendix) illustrates the seats-votes curve using a value of 3 for the slope. It is readily apparent that the relationship differs

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(Cont'd)

See also Chart TX-11a in the Appendix which illustrates that a curve value of 3 seems to fit congressional elections in Texas from 1982 to 2004. Using a lower number, for example a curve value of 2 or 2.5, would reduce the expected seats slightly but it would also indicate that the actual results were more "off-the-curve."

9. This would only be the "expected" increase in the area of the curve which is mostly linear, from approximately 35% to 65%.

10. For more on seats and votes, see Andrew Gelman & Gary King, *Estimating the Electoral Consequences of Legislative Redistricting*, 85 J. Am. Stat. Ass'n, No. 410, June 1990, at 247, and Graham Gudgin & Peter J. Taylor, *Seats, Votes, and the Spatial Organization of Elections* (1979).

11. In reality, the slope of the curve only approximates 3 close to the 50/50 point the slope decreases somewhat as the distance from 50/50 increases. Note also that in most cases, the "votes" component refers to the percentage of the "major party" vote, which is the combination of the votes for the Democrats and Republicans only.

12. The seats-votes curve is used here to represent the possible results of seats based upon the votes received. Obviously, there is no hard and fast rule that X% of the votes must translate into Y% of the seats. "Expected" is used to indicate that such a result would be a reasonable, foreseeable outcome according to the relationship of votes to seats in a single member districting system.

greatly from a straight proportional relationship, which would be represented by a diagonal line from the lower-left corner (0,0) to the upper-right corner (100,100) of the chart.[13]

A few examples of possible combinations of votes to seats are indicated on the chart by a shaded "X" or by a diamond-shaped symbol. Example "A" represents a case in which the party received 55% of the votes statewide and won 65% of the seats. Example "B" is the mirror-image of the previous example: a party received only 45% of the votes statewide and won only 35% of the seats. Both of these examples would be "on the curve," that is, the results would be expected considering the seat bonus aspect of the seats-votes curve.

The examples labeled as "C" and "D" would be "off the curve," that is, these are not "normal" results. Nevertheless, all four of these examples would still be logical in the sense that they represented "true" cases.[14] In examples "A" and "C," the party did receive a majority of the votes and it did win a majority of the seats ("true positives" majority of votes and seats). In examples "B" and "D," the party did not receive a majority of the votes and it did not win a majority of the seats ("true negatives" - minority of votes and seats).

Examples "E" and "F" represent two anomalies. Example "E" shows a party that received a majority of the votes; the expectation here is that the party would win a majority of the seats (a positive) yet it did not (a "false positive"). Example

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13. A straight line would be present in proportional representational or list systems such as those found in South Africa, Finland or Germany.

14. The terms "true" and "false" and "positive" and "negative" are used here solely as a logical construct to assist in the understanding of the relationship and the majoritarian principle that a majority of the voters should control a majority of the seats. A "positive" case would be one in which a majority of the votes was received. A "negative" case would be one in which a majority of the votes was NOT received. A "true" case would be one in which the majority of votes translates into a majority of the seats. A "false" case would be one in which the majority of the votes does NOT translate into a majority of the seats. The chart is subdivided into four portions, or quadrants, that include each of the four possibilities for this True/False, Positive/Negative framework. Of course, special cases to consider are the ones that actually fall on the 50% votes or 50% seats reference lines. This usually occurs with an even number of seats or in states with a very competitive election environment.

"F" depicts a party that did not receive a majority of the votes; the expectation here is that the party would not win a majority of the seats (a negative) yet it did (a "false negative"). Examples "E" and "F" are not only "off the curve" but also "false" cases.

Thus, using the seats-votes analysis, the inquiry revolves around two factors: 1) the basic inquiry as to the chart quadrant of each political party; and 2) the degree to which the data pairs (votes received and seats won) are near the seats-votes curve.

Most seats-votes charts are drawn with the Democrats as the party of interest.[15] Therefore, if the data point on the chart, *i.e.*, the intersection of the votes received and seats won, is to the left of the seats-votes curve, there is a possible advantage to the Democrats. The reason for this is that such a point to the left of, or above the curve, represents a case in which the Democrats received *more seats* than their percentage of the votes would warrant, based upon the seats-votes curve.

Another factor to recognize when reviewing such charts is the significance of "false" cases like the ones discussed above (any data point that appears in the upper left-hand quadrant of the chart or the lower right-hand quadrant). These cases represent anti-majoritarian results in that the party that received a majority of the votes did not receive a majority of the seats.

The concept of the seats-votes curve thus forms the basis of one of the key analytical frameworks used in assessing districting plans.[16] Nevertheless, while the outcome component (the vertical axis, or, percentage of seats) of the relationship is generally determined easily, there are several possible measures for determining the "votes" portion (the horizontal axis) of the relationship for congressional elections. Several measures of determining the "votes" may offer insight

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15. The reason for this is unknown but no significance as to the party of interest is implied. It may be simply that the Democrats were the majority congressional party during the formulation of much of the early research.

16. *See* Richard G. Niemi, *The Relationship Between Votes and Seats: The Ultimate Question in Political Gerrymandering*, 33 UCLA L. Rev. 185, 191 (1985) ("[S]ooner or later it [the Supreme Court] will have to take a position on the significance of the relationship between votes and seats won by each political party.").

into the majoritarian question raised by Justice Breyer in *Vieth v. Jubelirer*, whether "a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power." *Vieth v. Jubelirer*, 541 U.S. 267, 360 (2004) (Breyer, J., dissenting). Alternatives for assessing this majority support include at least the following: a) votes for the congressional races; b) votes for a particular statewide election, *e.g.*, President, Governor or some other partisan office; c) a combination of the votes for several statewide offices; or d) estimates based upon some hypothetical model.[17]

B. METHODOLOGICAL APPROACHES

1. Using Votes from Texas Congressional Elections

Using the aggregate votes cast in congressional elections as a basis for the analysis of congressional elections has been a standard methodological approach for decades; this was the approach used in Tufte's analysis in 1973.[18] Yet there are several ways to examine the relationship of seats to votes for congressional elections. The first decision is which votes to use. An aggregate of all congressional votes for all districts in Texas for each election year is a simple and relevant choice.[19] For the time period from 1982 through 2004, this provides 12 data items (elections): five for the redistricting cycle of the 1980s (1982-84-86-88-90); five for the redistricting cycle of the 1990s (1992-94-96-98-2000); plus one each for the 2002 and the 2004 elections.

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17. An additional consideration is whether to calculate the votes as a percentage of all votes cast or as percentage of the "major party" votes. Substantial differences will generally occur only when the collective votes received by independent candidates is above a minor level. For most discussions, the numbers used in this brief are the percentage of the major party vote.

18. *See* Tufte. Statewide aggregations of the raw congressional votes are readily available. *See* Richard M. Scammon *et al.*, *America Votes 25* (2003); Jerrold G. Rusk, *A Statistical History of the American Electorate* (2001); Bureau of the Census, *Statistical Abstract of the United States, 1948*, at 316 (1949); Erik Austin, *Political Facts of the United States Since 1789*, at 241 *et seq.* (1986)

19. "[M]easured by the votes actually cast for all candidates who identify themselves as members of that party in the relevant set of elections; i.e., in congressional elections if a congressional map is being challenged." *Vieth*, 541 U.S. at 366 (Breyer, J., dissenting).

Table 1. Percentage of Votes and Seats for the Democrats in Congressional Elections for Texas, 1982-2004, (Aggregate Totals of Major Party Votes Received and Actual Congressional Seats Won).[20]

Election Year	Dem % of Major Party Vote Received	Dem % of Actual Congressional Seats Won	Note
1982	66	81	True Positive
1984	58	63	True Positive
1986	58	63	True Positive
1988	60	70	True Positive
1990	55	70	True Positive
1992	51	70	True Positive
1994	43	63	**False Negative**
1996	46	57	**False Negative**
1998	46	57	**False Negative**
2000	49	57	**False Negative**
2002	45	53	**False Negative**
2004	40	34	True Negative

Table 1 demonstrates two basic political facts with respect to Texas congressional elections. First, whereas the Democrats commanded a majority of the votes in the 1980s, they could no longer do so into the 1990s. Second, even though they had lost the support of the electorate, the redistricting plans in effect through 2002 allowed the Democrats to retain a majority of Texas congressional seats while receiving a decreasing minority of the votes ("false negatives").

20. The percentage of votes for the Democrats listed in this table is based upon the percentage of major party votes cast. Using other methods of calculating the percentage of votes for the Democrats would not change that status for most years. The only possible exceptions would be for 1998, and possibly 2000, wherein it could be argued that the status for the Democrats might be True Positive.

For five successive elections, from the "big Republican year" of 1994 through 2002, the Democrats did not get a majority of the vote, and thus, based upon the seats-votes curve, would not be expected to win a majority of the seats. However, in all five elections Democrats won a majority of the congressional seats ("false negatives").

The 2002 court-drawn plan[21] failed to alleviate this problem: the Democrats still received a minority of the votes yet retained a majority of the congressional seats. Only with the implementation of the 2004 plan have election results conformed with the majoritarian aspect of congressional elections. The simple fact is that candidates of the Democratic party have lost the support of most Texas voters over the past decade (*see* Chart TX-11b in the Appendix), but the Democratic Party has lost a majority of the Texas congressional delegation only because the 2004 redistricting plan finally forged a districting plan that enables an appropriate relationship between the votes cast and the seats won. The 1990s and 2002 plans entrenched a minority in power. The 2004 plan permitted a majority to "work its political will." *Vieth*, 541 U.S. at 362 (Breyer, J., dissenting).

Applying these actual Texas congressional results to the seats-votes curve illustrates this as well (*see* Chart TX-11a in the Appendix, with shaded "X"s indicating the 2000, 2002 and 2004 elections). Even with the 1994 national Republican sweep, the election most "off the curve" was the 1994 election under the original 1992 plan. The 1996 election, held under a revised plan following litigation[22] was still "off the curve" in the favor of the Democrats. The 1998 and 2000 elections followed in the same vein and the 2002 election did little to ameliorate this inconsistency. It is only the congressional 2004 election, although still somewhat off the curve in favor of the Democrats, that is now at least in the logical portion, or quadrant, of the seats-votes graph. A majority of the voters

21. In this brief, *Amici* refer to the redistricting plans at issue by the election year for which they were effective. By way of cross-reference, the 2000 plan is also known as the 1990s' plan or plan 1000C; the 2002 plan is also known as the 2001 plan or plan 1151C; the 2004 plan is also known as the 2003 plan or plan 1374C.

22. *See Bush v. Vera*, 517 U.S. 952 (1996).

get a majority of the seats, the most basic promise of this Court in *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

The following table (*see* Table 2a below) lists the actual congressional votes and the expected seats based upon the seats-votes curve and demonstrates the shortage of Republican seats caused by each of the three plans. In all three elections, the Republicans received a majority of the congressional vote, but in each election, including 2004, fell short of the expected number of seats under the seats-votes curve. With an additional 4.7% points of the vote in 2004, even with a gain of 6 seats, the translation of the Republicans' 59.6% of the votes into seats would generally have been expected to result in 3 more seats.

Table 2a. Shortage of Congressional Seats for Republicans for each Texas Congressional Plan (based upon the actual congressional vote and the seats-votes curve)

Plan	[A] Republican Percentage of the Major Party Vote	[B] Expected GOP Seats (by Seats-Votes curve)	[C] Actual GOP Congressional Seats Won	[D] Shortage: Actual Compared Expected
2000	51.2	16 of 30	13	-3
2002	54.9	20 of 32	15	-5
2004	59.6	24 of 32	21	-3

2. Using Votes from Texas Statewide Elections

A similar method of reviewing Texas congressional elections was used in the district court's decision (*see* Joint Appendix, lower court opinion, at page 46). This approach uses the "Statewide Strength" as the "votes" component in the seats-votes relationship (*see* Chart TX-12 in the Appendix). This is described as the average for each year of all statewide partisan elections, excluding President, but including judicial elections. Judge Higginbotham, for the lower court, stated that "[f]or our purposes, this provides a rough approximation of a party's general appeal statewide" (*see* Joint Appendix at 47).

Using the statewide strength as a basis tends to minimize any district-specific, or plan-specific, factors that could affect the analysis. Yet, the results of applying the lower court's numbers to the seats-votes curve are remarkably similar to the previous approach using just the congressional numbers alone.

The District Court's approach shows several elections in which, based upon the average statewide strength, the Democrats did not have a majority of the electorate, yet they still managed to win a majority of the seats in the congressional delegation under the redistricting plans in effect for each year ("false negatives"). These cases are the five elections held from 1994 to 2002. This is the "entrenched minority in power" about which Justice Breyer expressed concern in *Vieth. Vieth*, 541 U.S. at 361-362 (Breyer, J., dissenting). Once again, only with the election held under the 2004 plan is the minority political position of the Democrat Party appropriately reflected in the congressional results. The 2004 congressional election *improved* the seats-votes relationship because it both moved the intersection of the votes received to the seats won closer to the curve and eliminated a non-majoritarian result. Again, each plan demonstrates a shortage of Republican seats over what could reasonably be expected. Also, regardless of whether a value of 3 is used for the seats-votes curve or a lower value, the relative difference between the 2004 plan and the previous ones is obvious.

Table 2b. Shortage of Congressional Seats for Republicans for each Texas Congressional Plan (based upon the lower court's "Statewide Strength" and the seats-votes curve).[23]

23. The lower court calculated the statewide strength based upon all available statewide partisan races (excluding president) as a percentage of the total vote. The numbers in the table reflect an adjustment to percentages based upon the major party vote. Portions of seats are rounded up to the nearest whole number, 0.5 is rounded up to the next highest seat. For most years there is only a very slight adjustment.

Plan	[A] Republican Percentage of "Statewide Strength"	[B] Expected GOP Seats (by Seats-Votes curve)	[C] Actual GOP Congressional Seats Won	[D] Shortage: Actual Compared Expected
2000	59.6	23 of 30	13	-10
2002	58.2	23 of 32	15	-8
2004	58.6	24 of 32	21	-3

3. Using One Statewide Texas Election as a Benchmark for Plan Comparison to Districts Carried in a Statewide Race

A further application of the District Court's approach can be made using a static indicator, *i.e.*, one election, here the 1998 election for Commissioner of Agriculture, as a benchmark for comparison. By using one election contest, rather than an average of elections from different years, this method isolates differences in the outcome from factors in each specific plan. This allows both a comparative and relative review of the three separate congressional plans used in the 2000, 2002 and 2004 elections in Texas.

For this one statewide race, the Republicans received 57.2% of the major party vote and the Democrats received 42.8%. Using the seats-votes curve we can estimate the percentage of the seats that this percentage of these votes would be expected to produce. As discussed above, with a seats-votes curve of 3, for every 1% increase in votes, there should be approximately a 3% increase in the seats won. For the Republicans, 57.2% of the vote translates into an "expected" 70.5% of seats. For the Democrats, 42.8% of the vote translates into an "expected" 29.5% of seats.

Applying these expected percentages of the seats for each election, held under different plans, produces the following summary:

Table 2c. Shortage of Congressional Seats for Republicans for each Texas Congressional Plan (based upon the 1998 race for Commissioner of Agriculture and the seats-votes curve)

Plan	[A] Republican Percentage for 1998 C. Agriculture	[B] Expected Republican Districts (by Seats-Votes curve)	[C] Districts Carried By GOP Statewide Candidate	[D] Shortage: Districts Carried to Expected
2000	57.2	21 of 30	18	-3
2002	57.2	22 of 32	19	-3
2004	57.2	22 of 32	21	-1

In each of these three elections, Republicans fell short of their "expected" share of seats. The 2002 plan did little to assuage the problem of the entrenched minority. It was only the 2004 plan that came close to permitting the majority to "work its political will." *Vieth*, 541 U.S. at 362 (Breyer, J., dissenting).

While reasonable minds may differ as to the appropriateness of this one race, the 1998 Commissioner of Agriculture, for such an analysis, the fact remains that the relative disparity, *i.e.*, the difference between the expected and the actual seats, was not improved by the 2002 plan but was improved by the 2004 plan.

This comparison, using a static statistical base, also illustrates that it is the 2004 plan that best conforms with the expectations of the seats-votes relationship.[24] The 2004 plan also best conforms with the fairness principle Democrat appellants[25] proposed in *Vieth*.

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24. Note also that by using the 2000 Presidential race rather than the 1998 Agriculture race, a similar result would be found. With 60.9% of the statewide vote, Republicans would be expected to win 25 out of 32 seats. Yet even with a popular former Governor at the top of the ticket, under all three plans there would still be a shortage of districts carried.

25. Brief of Appellant Opp. Mot. Aff. at 4, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (No. 02-1580). ("The frustration of majority rule is the linchpin

(Cont'd)

In summary, this section has reviewed the election results from the state of Texas. Regardless of the measure used, the fact that Republicans were able to translate their 60% of the Congressional vote into 66% of the Congressional seats is not an unrealistic outcome, given that we know the majority party does receive more than a proportional share of the seats statewide and is consistent with what is to be expected under the seats to votes relationship.

C. THE TEXAS CONGRESSIONAL PLANS AS PART OF THE NATIONAL CONGRESSIONAL MAP

1. Comparison Using National Congressional Votes Over Time

The results of several congressional elections can be reviewed year-by-year using the national totals of votes cast and seats won. The office of the Clerk of the U.S. House publishes biennial reports with the state and national totals for all congressional races.[26]

A review of the national congressional vote totals for the years 2000, 2002 and 2004 demonstrates that the 2004 national map was closer to the seats-votes curve than the 2002 map. (*See* Chart TX-21 in the Appendix). For the 2002 election, the Democrats received 47.6% of the national major party

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(Cont'd)

of appellants' claim. As their complaint clearly alleges, today one party consistently wins a majority of the vote in congressional elections in Pennsylvania, yet the other party is now virtually assured a majority of the State's congressional seats. But the guiding majoritarian ethic underlying our system of government demands that the party receiving the most votes typically will win the most seats.")

26. Reports back to 1920 are available via the internet at Off. of the Clerk, House of Representatives, http://clerk.house.gov/members/electionInfo/elections.html. They are entitled *Statistics of the [Presidential and] Congressional Election*. In actuality, for some years there may be some small differences in aggregate numbers used by analysts due to either a) discrepancies with state reports; b) special elections and/or elections not held on the November general election day; or c) party designations of candidates in some states. A concern to be noted relates to the fact that many congressional races are either completely uncontested or largely uncompetitive. However, in every year since 1982, except 1994, the number of these seats won by Democrats has exceeded those won by Republicans, in some years by substantial numbers. Therefore, to the extent that votes are underestimated, it would be the votes of the Republicans that suffer more.

congressional vote yet won 47.1% of the seats. The fact that this is a nearly straight proportional result is enticing yet misleading. By using a seats-votes curve with a slope value of 3, at 47.6% of the vote, the Democrats would only be expected to win 43% of the seats. By winning 47% of the seats, this is an overage of 4%, or approximately 12 seats.

For the 2004 election, the Democrats received slightly more of the national congressional vote, or 48.6%, with which they would be expected to win 46% of the seats, which is what they did win. Democrats won 46.4% of the seats, virtually "dead-on" the corresponding point of the seats/votes curve.[27]

2. Comparison of Texas as One of 50 Separate Delegations

The U.S. House is a composite chamber, comprised of members from 50 state delegations. After the 2000 apportionment there were seven at-large states so there are currently 43 distinct congressional districting plans for the U.S. House. A review of the national map by state delegation can be approached in a manner similar to that used above for the Texas delegation alone. Again, there are several alternatives: a) using the actual congressional votes, aggregated by state[28]; b) using the congressional results but based upon an average of all districts; and c) using a cross-state static political base. For this review, we will focus on the 2004 results, for each delegation by each method. No matter which method is used, the Texas delegation is not an outlier delegation.[29]

The first method, using the actual major party congressional results (*see* Chart TX-22 in the Appendix) demonstrates that with Texas 2004 map Democrats candidates did not get a majority of the vote (receiving 40.3% of the major party vote) and did not win a majority of the seats ("true negative").

27. Again, the seats-votes curve is used here for the purpose of illustration of what might be expected by the relationship of seats to votes in single member districting.

28. Aside from the 7 single member at-large states, the states of Arkansas, Florida and Louisiana, which have contests for which candidates are not on the ballot, may be excluded in some years.

29. Texas was an outlier for both the 2000 and 2002 elections where Texas was one of the few delegations, certainly the largest, in which a majority of the votes did not translate into a majority of the seats (*see* Chart TX-51, 52 Appendix.)

The second method, using the average of the major party vote percentages, has the same result - minority of the votes equals a minority of the seats ("true negative") (*see* Chart TX-23 in the Appendix).

The same result is reached using a third method - Presidential results - by congressional district (*see* Chart TX-24 in the Appendix). The Presidential results permit a generic cross-state analysis. These results are used by political observers and academics around the nation,[30] are calculated after each Presidential election and are published in standard national political reference sources.[31] Presidential results are also frequently used by political stakeholders during the line-drawing process.[32] This is the only statewide result that is available for every state and district.[33]

The 2004 graphical charts of these three methods illustrate that there are some cases in which the party that received a majority of the votes did not win a majority of the seats ("false cases"). Most of these states are designated as "false cases" because either they have an even number of seats or the "control" of the delegation is determined by only one seat or because the majority of the votes was a very slim one. (*see* Chart TX-41 in the Appendix).

Nevertheless, using any of these methods, Texas is near the middle of all state delegations. There are several states substantially "off-the-curve" to the left, meaning an advantage for the Democrats, and there are also several states "off-the-curve" to the right, meaning an advantage for the Republicans. Irrespective of whether any of these outliers reach an

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30. *See* David Mayhew, *Congressional Elections: The Case of the Vanishing Marginals*, 6(3) Polity, Spring 1974, at 295; Bernard Grofman & Thomas L. Brunell, *The Art of the Dummymander: The Impact of Recent Redistrictings on the Partisan Makeup of Southern House Seats, in Redistricting in the New Millennium* 183 (Peter F. Galderisi ed., 2005).

31. *See, e.g.*, Michael Barone et al., *The Almanac of American Politics 2006* (2005) (published biennially since 1974); Thomas R. Dye et al., *Politics in America* (6th ed. 2004) (published biennially since 1982); Charlie Cook, *The Cook Political Report* (published periodically throughout the year).

32. Clark Bensen, *Substantial Political Consequences: A Practitioner's Perspective on Redistricting*, Extensions, Fall 2004, at 5, 7.

33. These numbers are also reconfigured for subsequent redistricting plans. Thus, they are available for all states for each Congress.

"extremity of unfairness," *Vieth*, 541 U.S. at 344 (Souter, J., dissenting), the Texas 2004 plan is clearly not an outlier. As Justice Kennedy observed "[e]xcessiveness is not easily determined." *Id.* at 316 (Kennedy, J., concurring). But a lack of excessiveness is easily determined here. Furthermore, alteration of any individual state congressional redistricting plan, no matter how extreme, without reference to all of the other states congressional plans, will necessarily destroy the balancing effect that currently causes the national map to be basically fair (*see* Charts TX-21 and 24 in the Appendix).

Election results provide no basis for the characterization of the 2004 plan as an extreme or excessive partisan gerrymander. As Justice Breyer noted in *Vieth*, "[t]he bottom line is that courts should be able to identify the presence of one important gerrymandering evil, the unjust entrenching in power of a political party that the voters have rejected." 541 U.S. at 361-62 (Breyer, J., dissenting). Democratic Party candidates have been rejected by an ever growing majority of Texas voters, yet their counsel demands that this Court re-entrench them in power through a return to the 2002 congressional plan. Surely, if one can advocate that a court can identify this anti-majority evil and remedy it, why should not a state legislature provide the remedy. The 2004 plan removed Justice Breyer's strongest "indicia of abuse" - an entrenched minority holding on to power. *Id.* at 368.

In *Davis v. Bandemer*, 478 U. S. 109, 126 n.9 (1986), Justice White, writing for the plurality, noted that "a level of parity between votes and representation . . . is hardly an illegitimate extrapolation from our general majoritarian ethic and the objective of fair and adequate representation recognized in *Reynolds v. Sims*, 377 U.S. 533 (1964)." In *Gaffney*, this Court approved a statewide districting plan, which measured statewide political strength, not against registration data, but against actual votes cast. 412 U.S. at 738. *See also Karcher v. Daggett*, 462 U.S. 725, 754-55 & n.13 (1983) (Stevens, J., concurring).

If the difference between votes received and seats won is measured by how far "off-the-curve" a state's delegation is, at least a dozen states evidence a difference greater than that

found in the 2004 Texas plan. If the difference is measured as the relative difference between the votes received and the seats won, there are at least two dozen states with a greater difference. There are 43 states that have congressional districting plans. If this Court invalidates the 2004 Texas Plan as an excessive or extreme partisan gerrymander, then federal courts will be entering "a vast wonderland of judicial review of political activity," of the type this Court warned against in *Rogers v. Lodge*, 458 U.S. 613, 649-50 (1982) (Stevens, J., dissenting). The 2004 Texas plan cannot be fairly described as an extreme partisan gerrymander.

D. PARTISAN SYMMETRY

Amicus Professors King, Grofman, *et al.* promote the concept of "partisan symmetry" as a standard for plan assessment. Yet their brief includes no such analysis of any districting plans using this concept nor have any appellants advanced such analysis. The application of partisan symmetry to plan analysis, which requires subjective assessment from the analyst as to inclusion and the analytical weight of input variables, is fraught with potential pitfalls. The use of partisan symmetry is not a panacea for a court. At this stage of the Texas redistricting saga, it is more akin to Pandora's box.[34]

II. ISSUES THAT ARE UNIQUE TO CONGRESSIONAL DISTRICTING PLANS

A. ENTRENCHMENT BY INCUMBENTS

A gross partisan gerrymander of a state legislative plan can violate democratic values by conceding to the legislature the power of self selection. In extreme circumstances, this results in representatives arguably choosing their constituents,

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34. The subjectivity of applying partisan symmetry can be better understood by reviewing the software developed by Professor King known as "JudgeIt" (see JudgeIt, A Program for Evaluating Electoral Systems and Redistricting Plans, *at* http://gking.harvard.edu/judgeit/judgeit.html (accessed Jan. 12, 2006) for more information on the software itself). Examples of factors to be considered for inclusion are "a set of explanatory variables (such as vote in the last election, incumbency status, partisan control, campaign spending, etc.)" "Experts can disagree about which set of input data is relevant for a given case . . ." and the weight ascribed thereto. King Amicus at 10. While *Amici* King *et al.* downplay the importance of these differences, these choices can and do make real differences in the estimates that the statistical model will generate.

rather than the other way around, as the Framers intended. It can also lead to what Justice Breyer, dissenting in *Vieth*, termed "[t]he democratic harm of unjustified entrenchment" by a minority political party in power. 541 U.S. at 360. However, entrenchment is not a significant issue in this case, and does not warrant the intervention of the Court, for three reasons.

First, Members of Congress do not draw their own districts, as state legislators generally do, making personal political entrenchment more difficult to achieve. The U.S. House of Representatives does not enact congressional districting plans. And while Members of Congress may sometimes influence the drafting process, they have no "vote" or formal control over the process in any state. Thus, unlike state legislators, Members of Congress cannot insulate themselves from the popular will by drafting or redrafting their districts.

Second, this Court should not intervene in the "political thicket" of partisan gerrymandering of congressional districts because there is other, non-judicial relief available to the people through the political process. Justice Clark, concurring in *Baker v. Carr*, opined that he would "not consider intervention by this court in so delicate a field if there were any other timely and effective relief available to the people of Tennessee" by which they could effect the reapportionment of their legislature. 369 U.S. 186, 258 (1962) (Clark, J., concurring). As Justice Breyer notes in *Vieth*, improper gerrymandering can normally be cured by the majority through resort to the democratic process, and without resort to the courts. 541 U.S. at 362 ("Courts need not intervene often to prevent the kind of abuse I have described, because those harmed constitute a political majority, and a majority normally can work its political will."). Justice Breyer then explains that

> [w]here a State has improperly gerrymandered legislative or congressional districts to the majority's disadvantage, the majority should be able to elect officials in statewide races—particularly the Governor—who may help to undo the harm that districting has caused the majority's party, in the next round of districting if not sooner.

Id. Third, even if these remedies did not exist, the concept of entrenchment has no application here because the 2004 Texas

congressional plan does not result in the entrenchment of a minority. *See* discussion in Section I.C.1, *supra.*

B. NATIONAL LEVELING

The decentralization of the American Congressional redistricting process serves as a check on the aggregate amount of partisan bias that a predominantly state legislatively-directed redistricting system can produce nationally, as intended by the founders. *See The Federalist No.* 10 (James Madison) (Hallowell ed., 1842). "It is true that the same method is to a large degree resorted to by the several states, but the division of political power is so general and diverse that notwithstanding the inherent vice of the system of gerrymandering, some kind of equality of distribution results."[35] The national 2004 congressional election returns reinforce this statement.[36]

III. SOLUTION TO PARTISAN GERRYMANDERING

A. CONGRESSIONAL STATUTORY SOLUTION DISTRICTING CRITERIA

The solution to the problem of partisan congressional gerrymandering is not, as Appellants suggest, to involve the Courts more and more deeply in the process of line drawing. Rather, the solution is a legislative one, involving Congress. Article I, § 4 of the Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but the Congress may at any time by Law make or alter such Regulations,* except as to the Places of chusing [sic] Senators." (emphasis added). Congress – not the Courts – is the governmental organ vested with the express Constitutional authority to regulate redistricting. And though

35. House Committee Report, 1901, *quoted in* David Butler & Bruce Cain, *Congressional Redistricting: Comparative and Theoretical Perspectives* 24, 32 (1992) (finding that, as an empirical matter, redistricting lines generally exhibit minimal partisan bias); Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting,* 88 Am. Pol. Sci. Rev. 541, 542 (1994) (same). During the 1992 election cycle, after an equally suspect round of partisan gerrymandering, the House "experienced its largest turnover in recent memory." Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence in Incumbent-Protecting Gerrymanders,* 116 HARV. L. REV. 649, 654 (2002).

36. *See* Section I.C.1, *supra.*

Congress has not chosen to exercise this function recently, "[t]he power bestowed on Congress to regulate elections, and in particular to restrain the practice of political gerrymandering, has not lain dormant." *Vieth*, 541 U.S. at 276 (plurality opinion).

During the past two hundred years, Congress has passed numerous laws regulating the redistricting part of the apportionment process, by ratifying criteria for the drawing of district lines. *Id.*; citing Apportionment Act of 1842, ch. 47, 5 Stat. 491 (requiring Congressional elections to be from single-member districts "composed of contiguous territory"); Apportionment Act of 1862, ch.170, 12 Stat. 572 (imposing the same requirements); Apportionment Act of 1872, ch. 11, 17 Stat. 28 (requiring both contiguousness and "as nearly as practicable an equal number of inhabitants"); Apportionment Act of 1901, ch. 93, 31 Stat. 733 (adding a compactness requirements). When the most recent Act was passed in 1911, ch. 5, 37 Stat. 13, "[t]he requirements of contiguity, compactness, and equality of population were repeated . . . but were not thereafter continued." *Vieth*, 541 U.S. at 276-277. Though currently Congress requires only single-member districts, *see* 2 U.S.C. § 2c, "[r]ecent history, however, attests to Congress' awareness of the sort of districting practices appellants protest, and of its power under Article I, § 4 to control them." *Vieth*, 541 U.S. at 277. The Court further observed that "[s]ince 1980, no fewer than five bills have been introduced to regulate gerrymandering in congressional districting." *Id.* (citations omitted). In fact, since *Vieth* was decided in 2004, the pace of legislative efforts in Congress has quickened considerably. In contrast to the five bills in the twenty-four years before *Vieth*, in the one year since *Vieth*, at least *two* new congressional redistricting bills have been introduced in Congress.

Both bills attempt to apply uniform, nationwide statutory standards for congressional redistricting. *See* H.R. 2642, 109th Cong. (2005) (titled "Fairness and Independence in Redistricting Act of 2005"); H.R. 4094, 109th Cong. (2005) (titled "Redistricting Reform Act of 2005"). Both bills would require, among other things, that redistricting be handled by bipartisan

commissions in each state, who would be required to consider compactness, contiguity, and population equality, and prohibited from considering factors such as political affiliation or race of constituents. *Id.*

It is therefore clear that not only is Congress a more appropriate entity than the Courts to address the issue of partisan gerrymandering, but Congress is aware of its power, has exercised it before, and has the opportunity to do so again, if it determines that there is a need for such legislation. However, the Court should not confuse Congress' slow, deliberative approach to regulating gerrymandering with an abdication of that power. Given the legislative history described above, if Congress determines that legislation is necessary, it can exercise its discretion and act accordingly.

B. STATUTORY REQUIREMENT FOR GEOGRAPHICALLY- BASED DISTRICTS

Another way of addressing the issue of extreme gerrymandering is to analyze whether a disputed district is incompatible with the statutory districting system enacted by Congress. A statutory analysis provides the Court with a more manageable approach to address some egregious gerrymandered districts than the different measurements of partisan fairness. The torturously-shaped land masses that North Carolina,[37] Louisiana,[38] and Georgia,[39] called "Congressional Districts" were not truly "districts," as that term was used by Congress in the Act. These so-called districts are "amalgamations of census geography or blocs bearing no identifiable relationship to any geographic entity." Although this Court rejected these congressional plans as racial gerrymanders, alternatively, this Court could have invalidated them on statutory grounds. True districts are recognizable and understandable to both the electorate, who benefit from being able to identify their legislator and citizens with whom they share an interest, and to the elected, who benefit from recognizing the electorate and interests they represent.

37. *Shaw v. Reno*, 509 U.S. 630 (1993); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Easley v. Cromartie*, 532 U.S. 234 (2001).

38. *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993), *rev'd sub. nom., United States v. Hays*, 515 U.S. 737 (1995).

39. *Miller v. Johnson*, 515 U.S. 900 (1995).

American political history makes clear that Congress used the term "district" to delineate a specific geographically-based representational unit, a concept rooted in British law. Early colonists modeled the first legislative assembly held in America after the House of Commons, with members coming from and representing various plantations, towns, and areas. Kenneth C. Martis, *The Historical Atlas of the United States Congressional Districts, 1789-1983*, §1 (1982) (congressional districts). The area-specific notion of localized districts is also evident in James Madison's writings urging ratification of the Constitution. In Federalist Paper No. 56, Madison argued that geographically-limited representative districts would ensure that representatives mirrored the ideology and concerns of their constituents. "Divide the largest State into ten or twelve districts and it will be found that there will be no peculiar local interests in either which will not be within the knowledge of the representative of the district." *The Federalist* No. 56, at 250 (James Madison) (Hallowell ed., 1842). Madison clearly viewed districts as encompassing local, recognizable geographical units from which elected representatives would "bring with them . . . a local knowledge of their respective districts." *Id.* at 261.

In addition to the historical context illuminating the manner in which the term "district" was generally used in 1842, debate on the 1842 Act further indicates that Congress used the term to refer to a recognizable local representational unit of geography that respects political subdivisions. Senator Graham commented "[w]e find in every great nation with any extension of country . . . that the representative assemblies of the people have been chosen by counties, parishes, departments, and districts, by whatever named called. It ensures that personal and intimate acquaintance between the representative and constituent which is of the very essence of true representation." *Cong. Globe*, 36th Cong., 2d Sess. app. 749 (1842). The House debate also focused on the advantages of localized, geographically recognizable districts; Congressman Summers stated, "[t]he essential feature of representative democracy is that the Representative shall reflect the will and know the wants of his constituents. He

should live among them, be familiar with their condition, and hold with them a common political interest. These ends can only be secured by providing for representative elections in districts suited to the situation and convenience of the people." *Id.* at 354. To be sure, there is nothing in the legislative history of the first Apportionment Act that would indicate that the drafters ever considered that districts would be divided in any way other than straightforward geographic partitions representing local interest.

While the 1842 Apportionment Act has gone through a number of renditions over the past 150 years, the requirement that Congressional elections be held in "districts" has remained generally constant since 1842.[40] Thus, the use of the term in 2 U.S.C. §2c should be given its historical significance. The term "district" encompasses the explicit views of the Founding Fathers and early legislators that effective representation can only be had by dividing a state into unassuming geographic units encompassing a relatively recognizable region. Such "districts" give effect to political subdivisions, allow representatives to gain the "intimate familiarity" with local interests necessary to represent communities of interest, and are "convenient" for constituents. The tortured and sprawling amalgamations in some congressional plans,[41] in contrast, largely fail to follow any city or geographical reasoning, preventing representatives from becoming intimately familiar with issues important to their constituents and, to the extent that a representative is familiar with issues, often require the representative to represent communities of diverse interests and are inconvenient for voters. Geographical compactness serves independent values; it facilitates political organization, electoral campaigning and constituent representation. *See Karcher v. Daggett*, 462 U.S. 725, 756 (1983) (Stevens, J., concurring); *see also Prosser v. Election Bd.*, 793 F. Supp. 859, 863 (W.D. Wis. 1992) (three-judge court *per curiam*).

40. An Apportionment Act passed in 1850, ch. 11, 9 Stat. 433, dropped the provision requiring election by districts, but this provision was restored by act in 1862, ch. 170, 12 Stat. 572.

41. For example, Louisiana's Fourth Congressional District 1992 plan, or North Carolina's Tenth Congressional District 1992 plan.

To understand the concept of district as found in 2 U.S.C. § 2c, one must examine districts as they existed at the time of the Act's enactment in 1967, and at the time of the first predecessor Act requiring districts in 1842. The simplest comparison is visual. A court with maps from these time periods will see the stark differences between districts as they existed in 1842 and 1967, and the geographic pieces which some states present today as their 21st century congressional districts. Of course, visual inspection by a court can be supplemented with quantitative and qualitative measurements. There are a number of specific measurements of compactness or geographic unity which can assist the courting comparing districts as they existed at the time of the enactment of the federal statutory district requirement and now.[42] These various methods recognized in political science and geographic professional literature permit the Court not to be consigned solely to an aesthetic consideration.

This Court's handling of pornography is not an unreasonable analogy, as gerrymandering has been called political pornography. In fact, Justice Stewart's famous test for pornography, "I know it when I see it," *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964), was cited in the context of gerrymandering by Justice Stevens in *Karcher*, 402 U.S. at 755, at n.15 (Stevens, J. concurring). Justice Stevens observed, "[d]ramatic departures from compactness are a sign that something must be amiss." *Id.*

This Court has also had a role in defining the term "district." That this Court has not expressly addressed the issue of what constitutes a district under 2 U.S.C. § 2c does not mean that this Court has not delineated an understanding of what constitutes a district. In *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), this Court clearly expressed an understanding of the requirement of a degree of geographic compactness for the creation of representational districts, holding that a threshold matter in Voting Rights Act Section 2 litigation,

42. Bruce Adams, *A Model State Reapportionment Process: The Continuing Quest for "Fair and Effective Representation"*, 14 Harv. J. on Legis. 825 (1977). *See also Connor v. Finch*, 431 U.S. 407 (1977); Earnest C. Reock, Jr., *Measuring Compactness as a Requirement of Legislative Apportionment*, 5 Midwest J. of Pol Sci. 70 (1961).

single-member districts may be required from a multi-member district scheme when a minority group is "sufficiently large and *geographically compact* to constitute a majority in a single-member district." (Emphasis added.) In *Gingles* and its numerous progeny, this Court recognized the requirement of geographic compactness in the creation of representational districts. *See, e.g., Growe v. Emison*, 507 U.S. 25, 40 (1993).

Some congressional maps simply could not have been created in 1842 or 1967 because of the absence of the technological ability to craft such a map. Some "districts" are created from an amalgamation of census blocks, not political subdivisions, neighborhoods or any recognizable geographic, social, governmental or political unit. The 2004 Texas congressional plan in this case does not present to this Court the torturous and bizarre districts appropriate for this analysis, but it is a reasonable and manageable approach in other cases. There is a point at which districts go from "ugly" to "nonexistent." As this Court observed in *Shaw v. Reno*, 509 U.S. 630 (1993), and *Shaw v. Hunt*, 517 U.S. 899 (1996), "appearances do matter" in redistricting. Not every list of census blocks can be a congressional district without consideration of actual geography.

CONCLUSION

The adoption by the elected representatives of the citizens of Texas, through its legislature, of a new congressional districting plan for 2004 and subsequent elections was an action expressly provided for in our Constitution. State legislatures, not federal courts, have the responsibility to enact congressional districting plans. As the District Court held, and the Amici respectfully suggest, the election results, methods and analyses provided herein show the 2004 plan is significantly better at translating the votes of Texans into congressional representatives of their choice than the prior court-drawn plan. A majority of Texas voters elected a majority of its congressional delegation in 2004 for the first time in more than a decade.

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APPENDIX

Chart TX-1. Hypothetical Seats-Votes Curve;

Chart TX-11a. Seats Won compared to Votes Received, Texas Congress, 1982-2004 (Seats-Votes Curve);

Chart TX-11b. Seats Won compared to Votes Received, Texas Congress, 1982-2004 (Time Line Graph);

Chart TX-12. Seats Won compared to Votes Received, Statewide Strength, 1962-2004 (Seats-Votes Curve);

Chart TX-21. Seats Won compared to Votes Received, National Votes, 1982-2004 (Seats-Votes Curve);

Chart TX-22. Seats Won compared to Votes Received, State Delegations, Major Party Vote, 2004 (Seats-Votes Curve);

Chart TX-23. Seats Won compared to Votes Received, State Delegations, Average Percentage of the Major Party Vote, 2004 (Seats-Votes Curve);

Chart TX-24. Seats Won compared to Votes Received, State Delegations, Presidential Results by Congressional District, 2004 (Seats-Votes Curve);

Chart TX-41. False Cases in Congressional Elections, All States, 2004 (Table to accompany Charts TX-22, 23, and 24);

Chart TX-51. Seats Won compared to Votes Received, State Delegations, Major Party Vote, 2000 (Seats-Votes Curve);

Chart TX-52. Seats Won compared to Votes Received, State Delegations, Major Party Vote, 2002 (Seats-Votes Curve);

Chart TX-71. Seats Won compared to Votes Received, Reports of the Clerk of the U.S. House of Representatives, All States, 1982-2004 (Table of Figures with Time Line Graph).

Appendix

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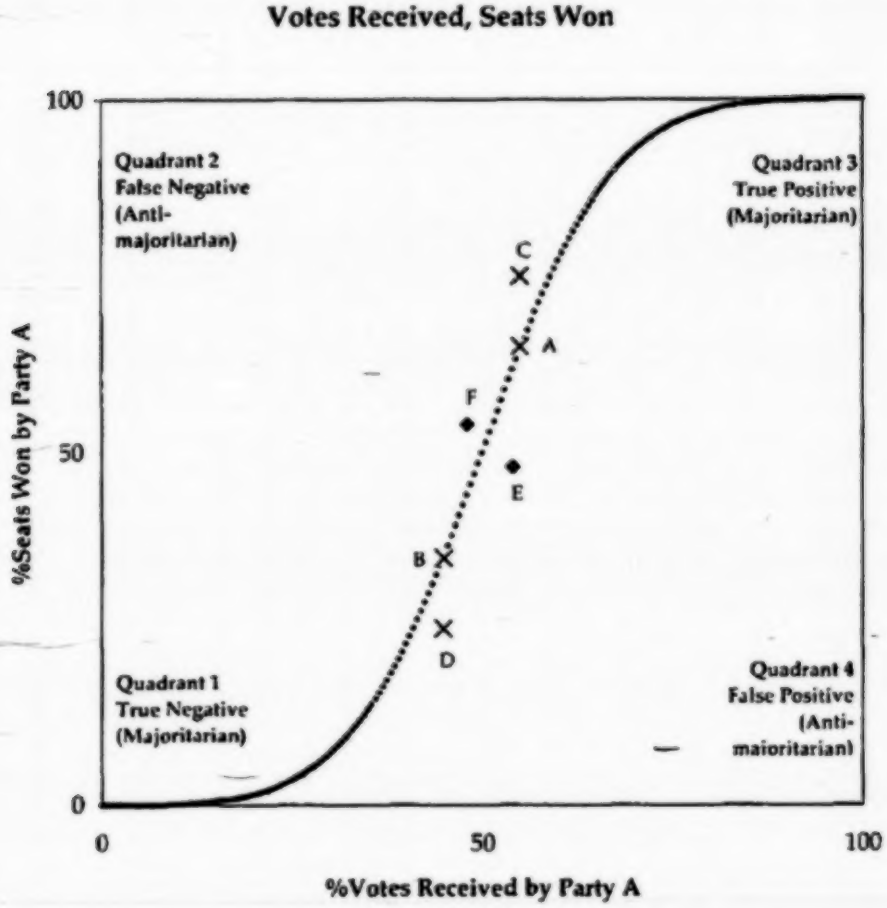
Appendix

Hypothetical Seats-Votes Curve

Example of the relationship between Votes Received and Seats Won

Chart TX-1.
Curve value is 3

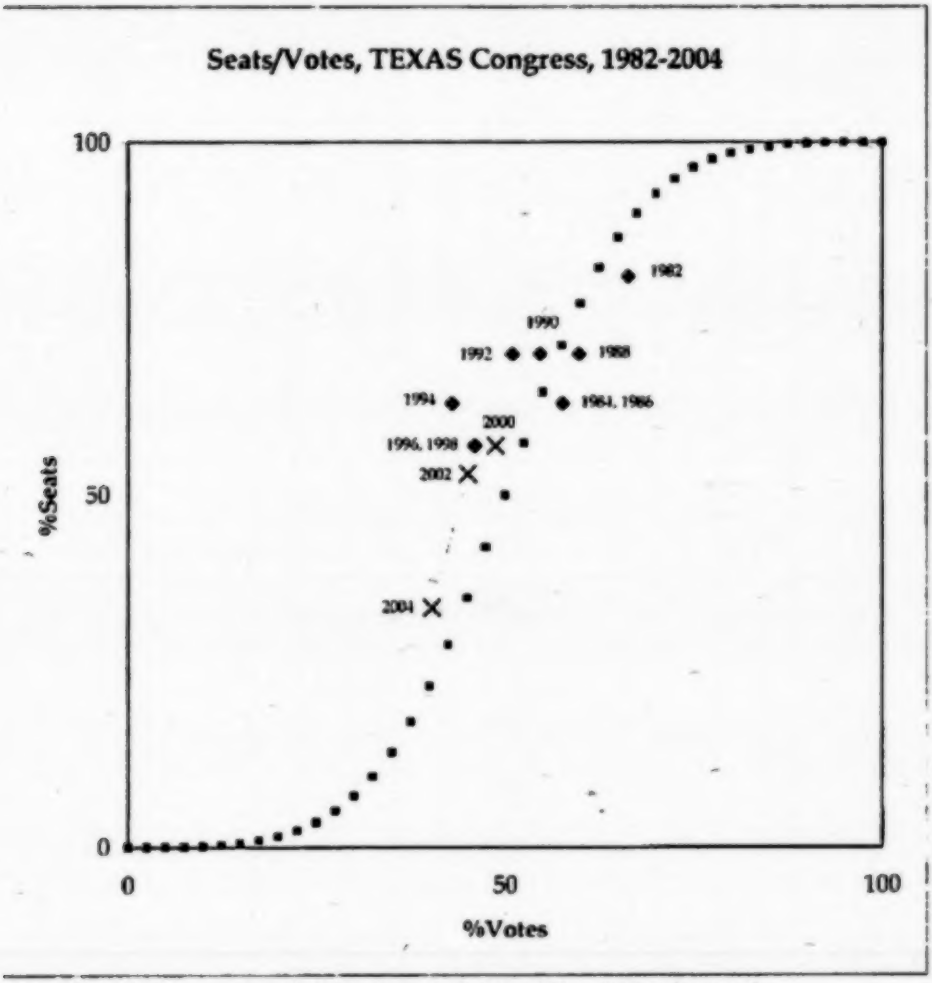


Data Point	%Votes	%Seats	Quadrant	True/False Status
A	55	65	3	True Positive
B	45	35	1	True Negative
C	55	75	3	True Positive
D	45	25	1	True Negative
E	54	48	4	False Positive
F	48	54	2	False Negative

Appendix

Seats Won compared to Votes Received, Texas Congress **Chart TX-11a.**

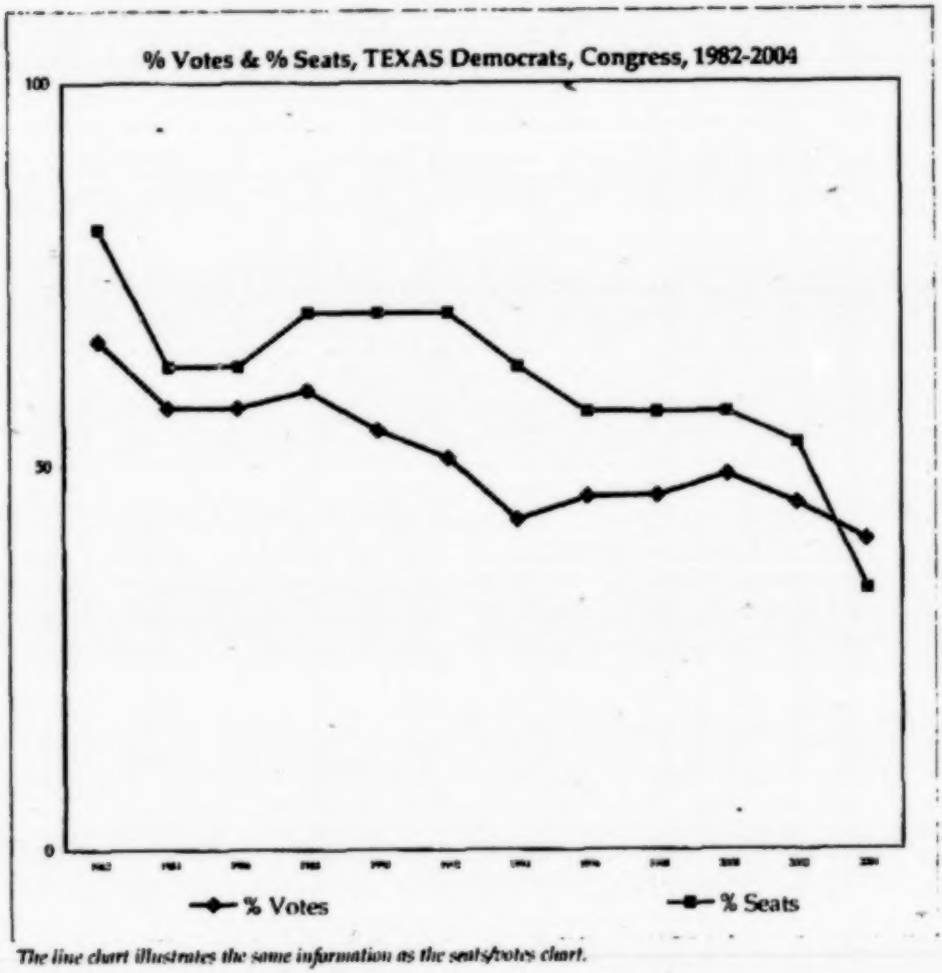
Votes based upon the Major Party Vote for Congress for the DEMOCRATS Curve value is 3



Note: Each symbol represents one election; years marked with an "X" are indicated on page 2.

Appendix

Seats Won compared to Votes Received, Texas Congress **Chart TX-11b.**



The line chart illustrates the same information as the seats/votes chart.

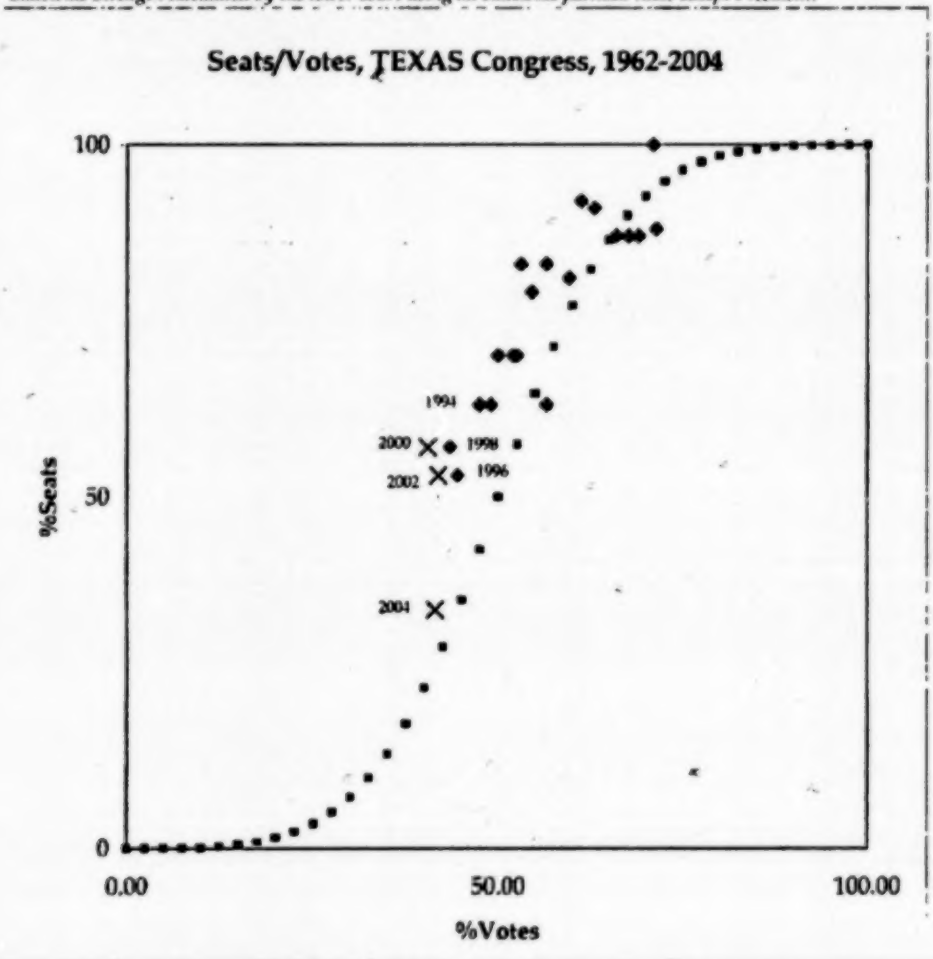
Year	D% MajVote	D% TotSeats	D Seats	All Seats
1982	66	81	22	27
1984	58	63	17	27
1986	58	63	17	27
1988	60	70	19	27
1990	55	70	19	27
1992	51	70	21	30
1994	43	63	19	30
1996	46	57	17	30
1998	46	57	17	30
2000	49	57	17	30
2002	45	53	17	32
2004	40	34	11	32

Appendix

Seats Won compared to Votes Received, Statewide Strength **Chart TX-12.**

Votes based upon the Major Party Statewide Strength for the DEMOCRATS Curve value is 3

Statewide Strength calculated by the lower court using all statewide partisan races except President.



Note: Each symbol represents one election; years marked with an "X" are underlined below.

Year	D% TotVote	D% TotSeats	Year	D% TotVote	D% TotSeats
1962	63.0	91.0	1984	49.0	63.0
1964	71.0	100.0	1986	56.6	63.0
1966	67.7	87.0	1988	52.5	70.0
1968	69.0	87.0	1990	52.0	70.0
1970	66.0	87.0	1992	50.0	70.0
1972	53.1	83.0	1994	47.5	63.0
1974	71.4	88.0	1996	44.4	53.0
1976	61.2	92.0	1998	43.4	57.0
1978	56.6	83.0	2000	40.4	57.0
1980	54.5	79.0	2002	41.8	53.0
1982	59.6	81.0	2004	41.4	34.0

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Appendix

Year	D% TotVote	D% TotSeats	D Seats	All Seats	D S/V %Dif
1962	63.0	91	20	22	44.4
1964	71.0	100	22	22	40.8
1966	67.7	87	20	23	28.6
1968	69.0	87	20	23	26.1
1970	66.0	87	20	23	31.8
1972	53.1	83	20	24	56.2
1974	71.4	88	21	24	23.2
1976	61.2	92	22	24	50.3
1978	56.6	83	20	24	46.7
1980	54.5	79	19	24	44.8
1982	59.6	81	22	27	35.9
1984	49.0	63	17	27	28.6
1986	56.6	63	17	27	11.4
1988	52.5	70	19	27	33.3
1990	52.0	70	19	27	34.5
1992	50.0	70	21	30	40.0
1994	47.5	63	19	30	32.7
1996	44.4	53	16	30	19.3
1998	43.4	57	17	30	31.2
2000	40.4	57	17	30	41.1
2002	41.8	53	17	32	26.7
2004	41.4	34	11	32	-17.9

Symbols indicated on the chart by an "X" are underlined in this table.

Appendix

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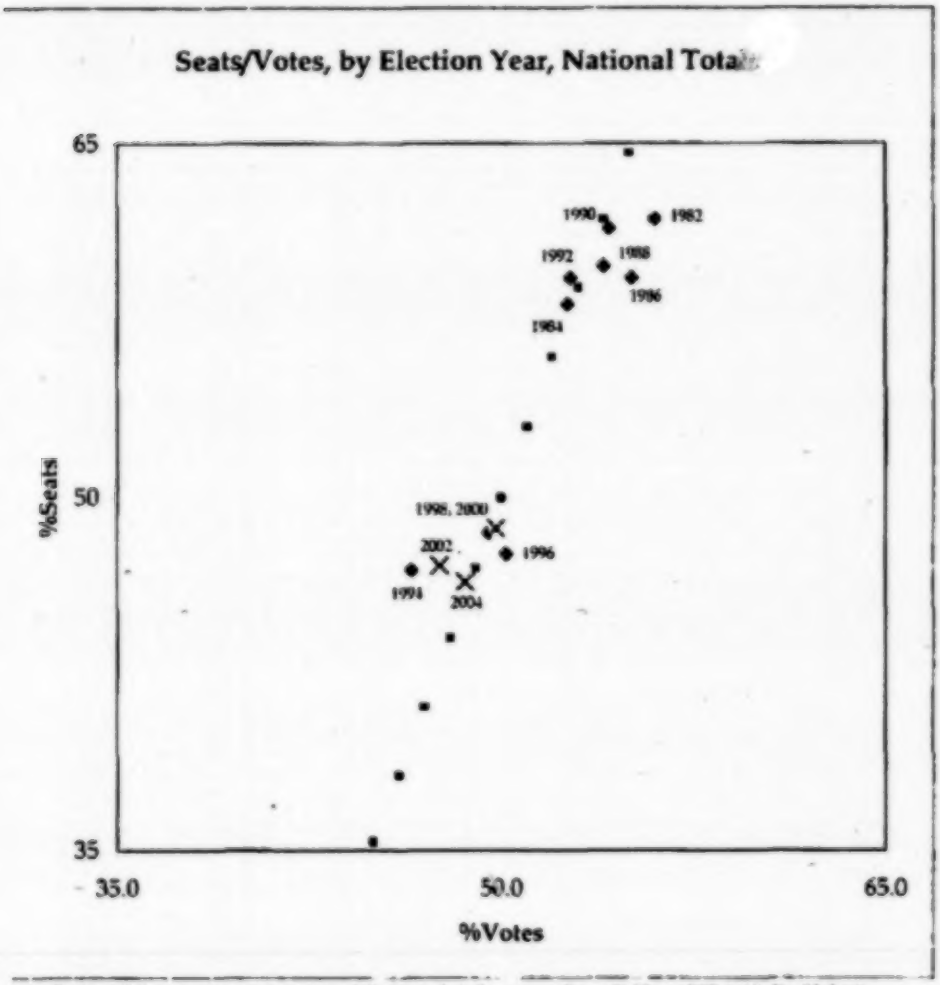
Appendix

Seats Won compared to Votes Received, National Vote **Chart TX-21.**

Based upon the Major Party Votes for Congress for the DEMOCRATS Curve value is 3



Note: Each symbol represents one congressional election; selected years may be marked by an "X" (underlined below).

Year	D %Maj Vote	D% TotSeats
1982	56.0	61.8
1984	52.6	58.2
1986	55.1	59.3
1988	54.0	59.8
1990	54.2	61.4
1992	52.7	59.3

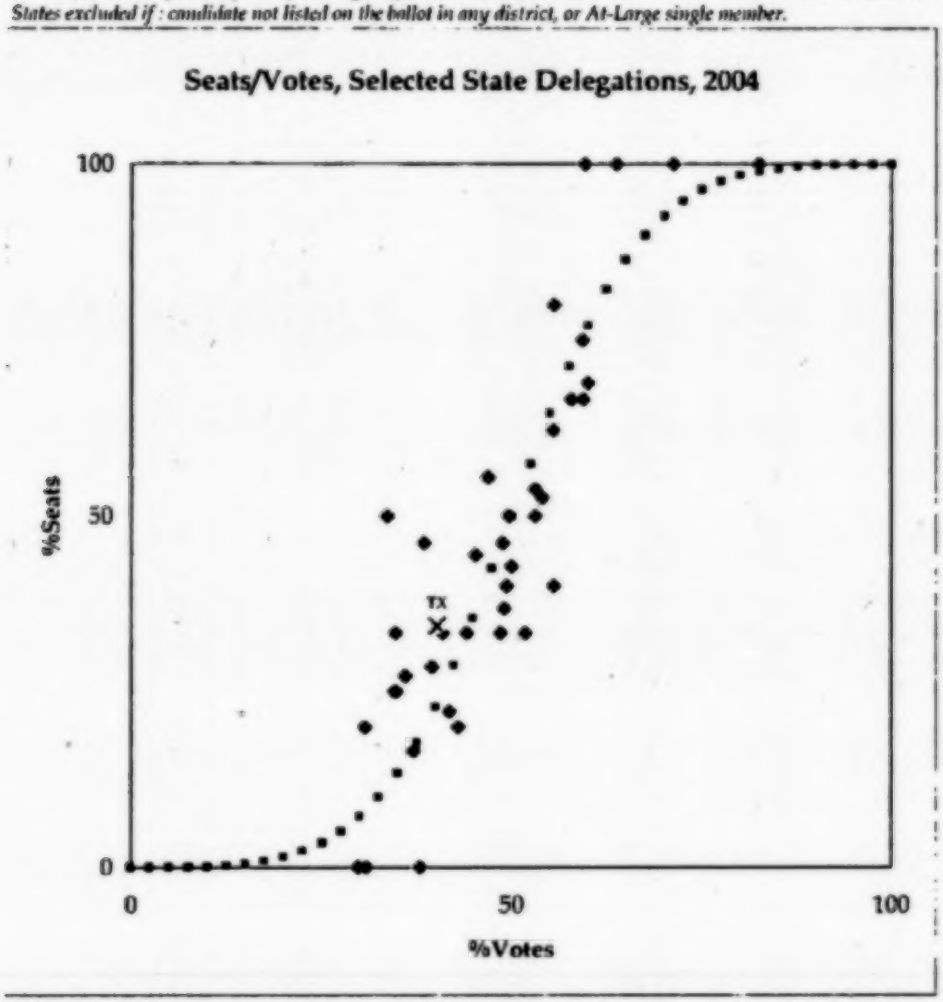
Year	D %Maj Vote	D% TotSeats
1994	46.5	46.9
1996	50.2	47.6
1998	49.3	48.5
2000	49.8	48.7
2002	47.6	47.1
2004	48.6	46.4

Appendix

Seats Won compared to Votes Received, State Delegations **Chart TX-22.**

Based upon the Major Party Vote for Congress for the DEMOCRATS Curve value is 3

States excluded if : candidate not listed on the ballot in any district, or At-Large single member.



Note: Each symbol represents one congressional delegation; selected states may be marked by an "X" (see p.2).

11a

Appendix

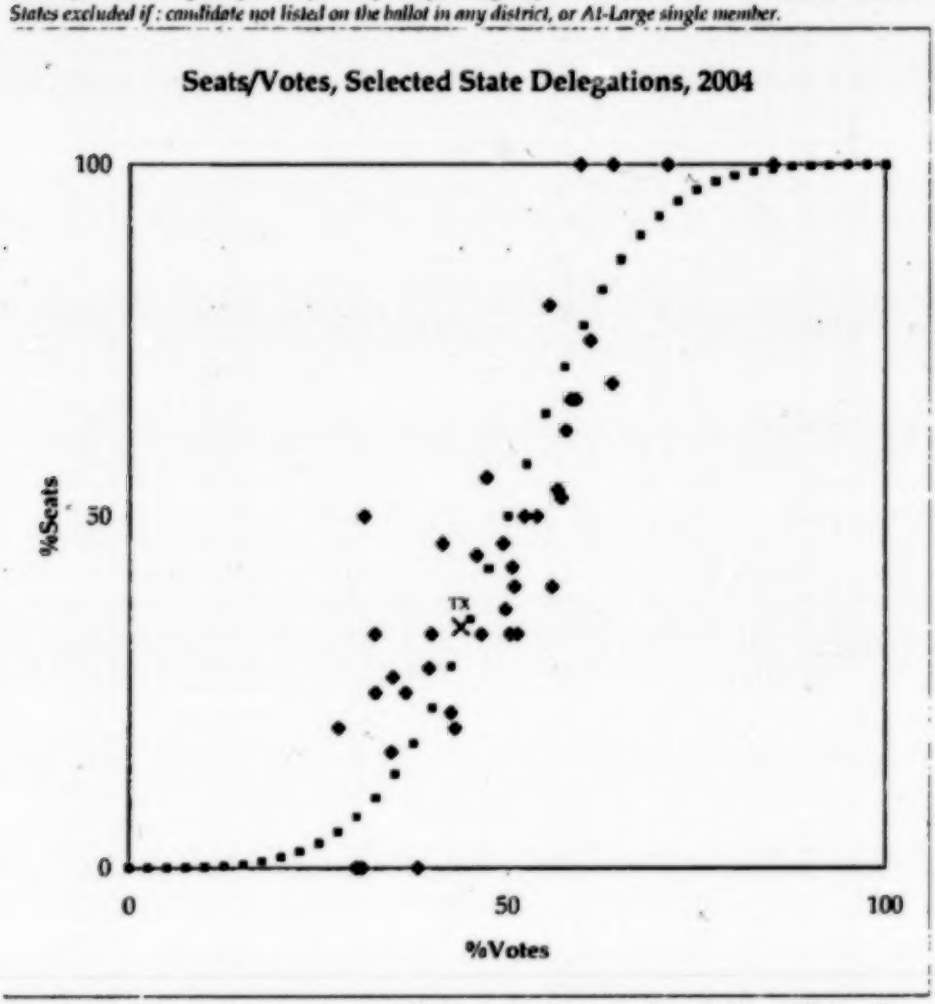
St	D% TotVote	D% TotSeats	D Seats	R Seats	D% MajVote	D% PtySeats	D S/V %Dif
AL	39.5	28.5	2	5	39.6	28.5	-28.0
AK	22.4	0.0	0	1	23.9	0.0	-100.0
AZ	31.9	25.0	2	6	34.6	25.0	-27.7
AR	n/a	75.0	3	1	n/a	75.0	n/a
CA	53.6	62.2	33	20	55.4	62.2	12.3
CO	48.8	42.8	3	4	50.0	42.8	-14.4
CT	55.0	40.0	2	3	55.5	40.0	-27.9
DE	29.6	0.0	0	1	30.0	0.0	-100.0
FL	n/a	28.0	7	18	n/a	28.0	n/a
GA	38.5	46.1	6	7	38.5	46.1	19.7
HI	62.8	100.0	2	0	63.8	100.0	56.7
ID	29.8	0.0	0	2	29.8	0.0	-100.0
IL	53.6	52.6	10	9	54.0	52.6	-2.6
IN	41.3	22.2	2	7	41.9	22.2	-47.0
IA	42.8	20.0	1	4	43.1	20.0	-53.6
KS	33.4	25.0	1	3	34.5	25.0	-28.2
KY	36.8	16.6	1	5	37.1	16.6	-55.3
LA	n/a	28.5	2	5	n/a	28.5	n/a
ME	58.9	100.0	2	0	59.6	100.0	67.8
MD	58.2	75.0	6	2	59.3	75.0	26.5
MA	79.8	100.0	10	0	82.5	100.0	21.2
MI	48.4	40.0	6	9	49.4	40.0	-19.0
MN	51.4	50.0	4	4	53.1	50.0	-5.8
MS	29.9	50.0	2	2	33.6	50.0	48.8
MO	44.7	44.4	4	5	45.4	44.4	-2.2
MT	32.7	0.0	0	1	33.7	0.0	-100.0
NE	30.1	0.0	0	3	30.9	0.0	-100.0
NV	42.1	33.3	1	2	44.2	33.3	-24.7
NH	37.3	0.0	0	2	38.0	0.0	-100.0
NJ	52.4	53.8	7	6	53.1	53.8	1.3
NM	51.8	33.3	1	2	51.8	33.3	-35.7
NY	59.1	68.9	20	9	60.0	68.9	14.8
NC	48.9	46.1	6	7	48.9	46.1	-5.7
ND	59.5	100.0	1	0	59.5	100.0	68.1
OH	48.5	33.3	6	12	48.6	33.3	-31.5
OK	28.3	20.0	1	4	30.7	20.0	-34.9
OR	53.7	80.0	4	1	55.5	80.0	44.1
PA	48.1	36.8	7	12	49.1	36.8	-23.1
RI	69.4	100.0	2	0	71.2	100.0	40.4
SC	33.8	33.3	2	4	34.7	33.3	-4.0
SD	33.3	100.0	1	0	53.7	100.0	86.2
TN	46.5	55.5	5	4	47.0	55.5	18.1
TX	39.0	34.3	11	21	40.3	34.3	-14.9
UT	39.7	33.3	1	2	41.0	33.3	-18.8
VT	7.1	0.0	0	0	22.6	n/a	n/a
VA	34.0	27.2	3	8	36.0	27.2	-24.4
WA	58.9	66.6	6	3	59.4	66.6	12.1
WV	57.5	66.6	2	1	57.8	66.6	15.2
WI	48.3	50.0	4	4	49.7	50.0	0.6
WY	41.8	0.0	0	1	43.0	0.0	-100.0
			202	232			

Appendix

Seats Won compared to Votes Received, State Delegations **Chart TX-23.**

Based upon the Average % of the Major Party Vote for Congress for the DEMOCRATS Curve value is 3

States excluded if : candidate not listed on the ballot in any district, or At-Large single member.



Note: Each symbol represents one congressional delegation; selected states may be marked by an "X" (see p.2).

Average

13a

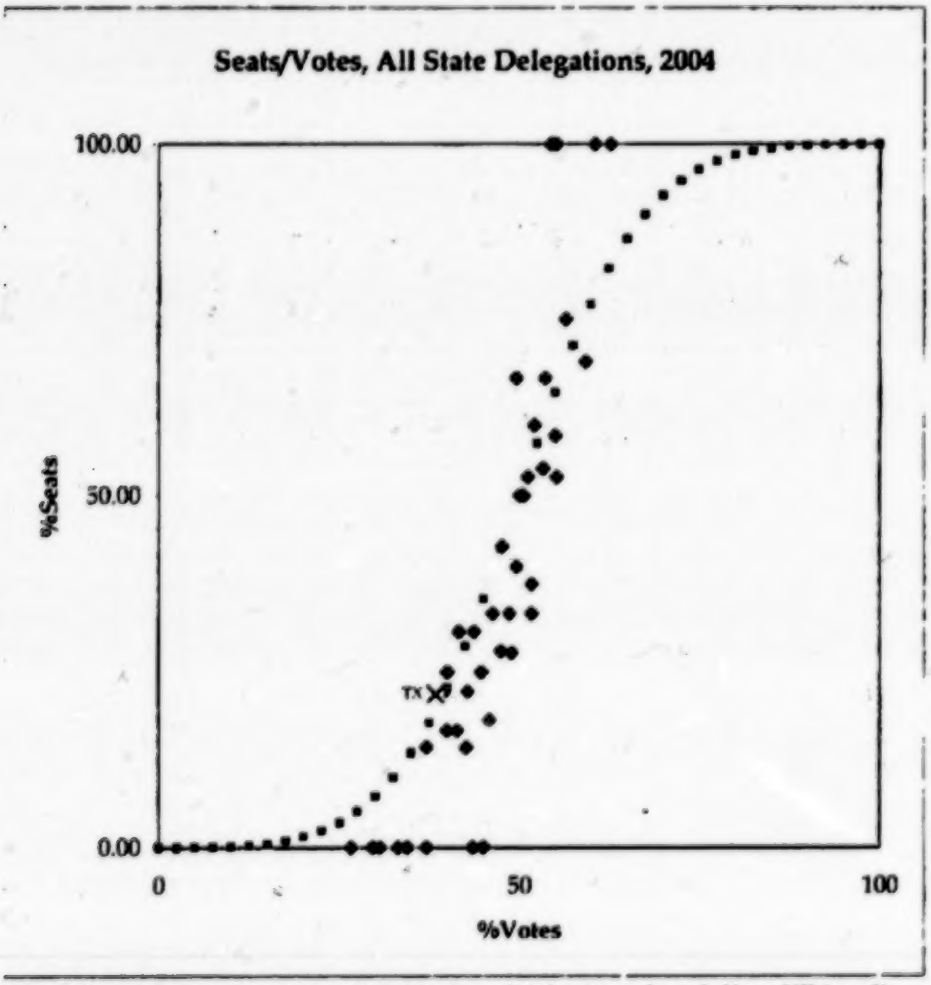
Appendix

St	D% TotVote	D% TotSeats	D Seats	R Seats	D% MajVote	D% PtySeats	D S/V %Dif
AL	39.5	28.5	2	5	39.6	28.5	-28.0
AK	22.4	0.0	0	1	23.9	0.0	-100.0
AZ	31.9	25.0	2	6	36.5	25.0	-31.5
AR	n/a	75.0	3	1	n/a	75.0	n/a
CA	53.5	62.2	33	20	57.7	62.2	7.8
CO	48.8	42.8	3	4	50.6	42.8	-15.4
CT	55.0	40.0	2	3	55.9	40.0	-28.4
DE	29.6	0.0	0	1	30.1	0.0	-100.0
FL	n/a	28.0	7	18	n/a	28.0	n/a
GA	38.5	46.1	6	7	41.4	46.1	11.4
HI	62.8	100.0	2	0	63.9	100.0	56.5
ID	29.8	0.0	0	2	29.9	0.0	-100.0
IL	53.6	52.6	10	9	57.1	52.6	-7.9
IN	41.3	22.2	2	7	42.5	22.2	-47.8
IA	42.8	20.0	1	4	43.0	20.0	-53.5
KS	33.4	25.0	1	3	32.5	25.0	-23.1
KY	36.8	16.6	1	5	34.6	16.6	-52.0
LA	n/a	28.5	2	5	n/a	28.5	n/a
ME	58.9	100.0	2	0	59.6	100.0	67.8
MD	58.2	75.0	6	2	60.9	75.0	23.2
MA	79.8	100.0	10	0	85.1	100.0	17.5
MI	48.4	40.0	6	9	50.9	40.0	-21.4
MN	51.4	50.0	4	4	53.9	50.0	-7.2
MS	29.9	50.0	2	2	31.0	50.0	61.3
MO	44.7	44.4	4	5	45.9	44.4	-3.3
MT	32.7	0.0	0	1	33.7	0.0	-100.0
NE	30.1	0.0	0	3	30.7	0.0	-100.0
NV	42.1	33.3	1	2	46.5	33.3	-28.4
NH	37.3	0.0	0	2	38.1	0.0	-100.0
NJ	52.4	53.8	7	6	56.6	53.8	4.9
NM	51.8	33.3	1	2	51.3	33.3	-35.1
NY	59.1	68.9	20	9	63.8	68.9	8.0
NC	48.9	46.1	6	7	49.4	46.1	-6.7
ND	59.5	100.0	1	0	59.6	100.0	67.8
OH	48.5	33.3	6	12	50.3	33.3	-33.8
OK	28.3	20.0	1	4	27.6	20.0	-27.5
OR	53.7	80.0	4	1	55.5	80.0	44.1
PA	48.1	36.8	7	12	49.7	36.8	-26.0
RI	69.4	100.0	2	0	71.2	100.0	40.4
SC	33.8	33.3	2	4	32.4	33.3	2.8
SD	53.3	100.0	1	0	53.8	100.0	85.9
TN	46.5	55.5	5	4	47.2	55.5	17.6
TX	39.0	34.3	11	21	43.8	34.3	-21.7
UT	39.7	33.3	1	2	39.9	33.3	-16.5
VT	7.1	0.0	0	0	22.6	n/a	n/a
VA	34.0	27.2	3	8	34.8	27.2	-21.8
WA	58.9	66.6	6	3	59.0	66.6	12.9
WV	57.5	66.6	2	1	58.3	66.6	14.2
WI	48.5	50.0	4	4	52.2	50.0	-4.2
WY	41.8	0.0	0	1	43.1	0.0	-100.0
			202	232			

Appendix

Seats Won compared to Votes Received, Pres. By C.D.
Based upon the Major Party Statewide Vote for President for the DEMOCRATS

Chart TX-24.
Curve value is 3



Note: Each symbol represents one congressional delegation; selected states may be marked by an "X" (see p.2).

15a

Appendix

Sta	D% TotVote	D% TotSeats	D Seats	R Seats	D% MajVote	D% PtySeats
AL	36.8	14.3	1	6	37.1	14.3
AK	35.5	0.0	0	1	36.7	0.0
AZ	44.4	25.0	2	6	44.7	25.0
AR	44.5	0.0	0	4	45.0	0.0
CA	54.3	58.5	31	22	55.0	58.5
CO	47.0	42.9	3	4	47.6	42.9
CT	54.3	100.0	5	0	55.2	100.0
DE	53.3	0.0	1	0	53.8	100.0
FL	47.0	28.0	7	18	47.4	28.0
GA	41.4	30.8	4	9	41.6	30.8
HI	54.0	100.0	2	0	54.4	100.0
ID	30.2	0.0	0	2	30.6	0.0
IL	54.8	52.6	10	9	55.2	52.6
IN	39.2	22.2	2	7	39.5	22.2
IA	49.2	40.0	2	3	49.6	40.0
KS	36.6	0.0	0	4	37.1	0.0
KY	39.6	16.7	1	5	39.9	16.7
LA	42.2	14.3	1	6	42.6	14.3
ME	53.5	100.0	2	0	54.5	100.0
MD	55.9	75.0	6	2	56.5	75.0
MA	61.9	100.0	10	0	62.7	100.0
MI	51.2	33.3	5	10	51.7	33.3
MN	51.0	37.5	3	5	51.7	37.5
MS	39.7	25.0	1	3	40.0	25.0
MO	46.1	33.3	3	6	46.3	33.3
MT	38.5	0.0	0	1	39.5	0.0
NE	32.6	0.0	0	3	33.1	0.0
NV	47.8	33.3	1	2	48.6	33.3
NH	50.2	50.0	1	1	50.6	50.0
NJ	52.9	53.8	7	6	53.3	53.8
NM	49.0	66.7	2	1	49.6	66.7
NY	58.3	69.0	20	9	59.2	69.0
NC	43.5	30.8	4	9	43.7	30.8
ND	33.5	0.0	0	1	36.0	0.0
OH	48.7	27.8	5	13	48.9	27.8
OK	34.4	0.0	0	5	34.4	0.0
OR	51.3	60.0	3	2	52.1	60.0
PA	50.9	52.6	10	9	51.2	52.6
RI	59.4	100.0	2	0	60.5	100.0
SC	40.9	16.7	1	5	41.3	16.7
SD	38.4	0.0	0	1	39.0	0.0
TN	42.5	22.2	2	7	42.8	22.2
TX	38.2	21.9	7	25	38.4	21.9
UT	26.0	0.0	0	3	26.6	0.0
VT	58.9	0.0	1	0	60.3	100.0
VA	45.4	18.2	2	9	45.8	18.2
WA	52.8	66.7	6	3	53.6	66.7
WV	43.2	0.0	0	3	43.5	0.0
WI	49.7	50.0	4	4	50.1	50.0
WY	29.0	0.0	0	1	29.6	0.0

States indicated on the chart by an "X" are underlined in this table.

Appendix

Falses Cases in Congressional Elections, All States, 2004

Chart TX-41.
Curve value is 3

Delegations classified by number of districts involved to change seats/votes status

"False Negative": less than a majority of the votes but a majority of the seats
"False Positive": a majority of the votes but less than a majority of the seats
Cases with either 50% of votes or 50% of seats are underlined.

1) Pct. Major Party	Delegation	D %MP Vote	D % Seats	Status	Notes
A) Even Number of Districts; delegation split 50/50					
	Minnesota	53.1	50.0	False Positive	4D, 4R
	Mississippi	33.6	50.0	False Negative	2D, 2R
	Wisconsin	49.7	50.0	False Negative	4D, 4R
B) Odd Number of Districts; delegation controlled by 1 seat					
	Colorado	50.0	42.8	False Positive	3D, 4R
	Connecticut	55.5	40.0	False Positive	2D, 3R
	Tennessee	47.0	55.5	False Negative	5D, 4R
	New Mexico	51.8	33.3	False Positive	1D, 2R
C) Even or Odd Number of Districts; delegation controlled by more than 1 seat					
	None				

2) Avg. Maj. Party	Delegation	D %MP Vote	D % Seats	Status	Notes
A) Even Number of Districts; delegation split 50/50					
	Minnesota	52.9	50.0	False Positive	4D, 4R
	Mississippi	31.0	50.0	False Negative	2D, 2R
	Wisconsin	52.2	50.0	False Positive	4D, 4R
B) Odd Number of Districts; delegation controlled by 1 seat					
	Connecticut	55.9	40.0	False Positive	2D, 3R
	Tennessee	47.2	55.5	False Negative	5D, 4R
	New Mexico	51.3	33.3	False Positive	1D, 2R
	Colorado	50.3	33.3	False Positive	3D, 4R
C) Even or Odd Number of Districts; delegation controlled by more than 1 seat					
	Ohio	50.3	33.3	False Positive	6D, 12R
	Michigan	50.5	40.0	False Positive	6D, 9R

3) Pres. By C.D.	Delegation	D %MP Vote	D % Seats	Status	Notes
A) Even Number of Districts; delegation split 50/50					
	Wisconsin	50.7	50.0	False Positive	4D, 4R
	N. Hampshire	50.6	50.0	False Positive	1D, 1R
B) Odd Number of Districts; delegation controlled by 1 seat					
	New Mexico	49.6	66.7	False Negative	2D, 1R
C) Even or Odd Number of Districts; delegation controlled by more than 1 seat					
	Michigan	51.7	33.3	False Positive	5D, 10R
	Minnesota	51.7	37.5	False Positive	3D, 5R

[chart, n.t. ds, page 1]

Appendix

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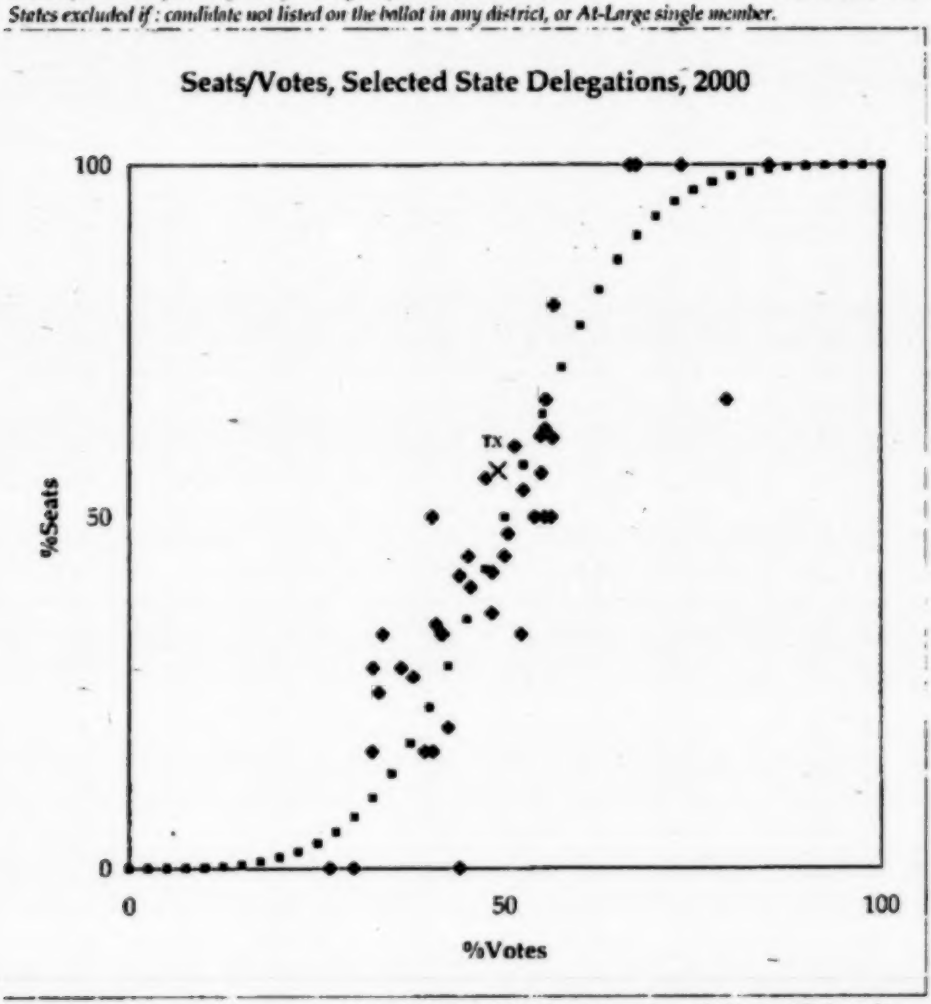
Appendix

Seats Won compared to Votes Received, State Delegations **Chart TX-51.**

Based upon the Major Party Vote for Congress for the DEMOCRATS Curve value is 3

States excluded if : candidate not listed on the ballot in any district, or At-Large single member.



Note: Each symbol represents one congressional delegation; selected states may be marked by an "X" (see p.2).

Appendix

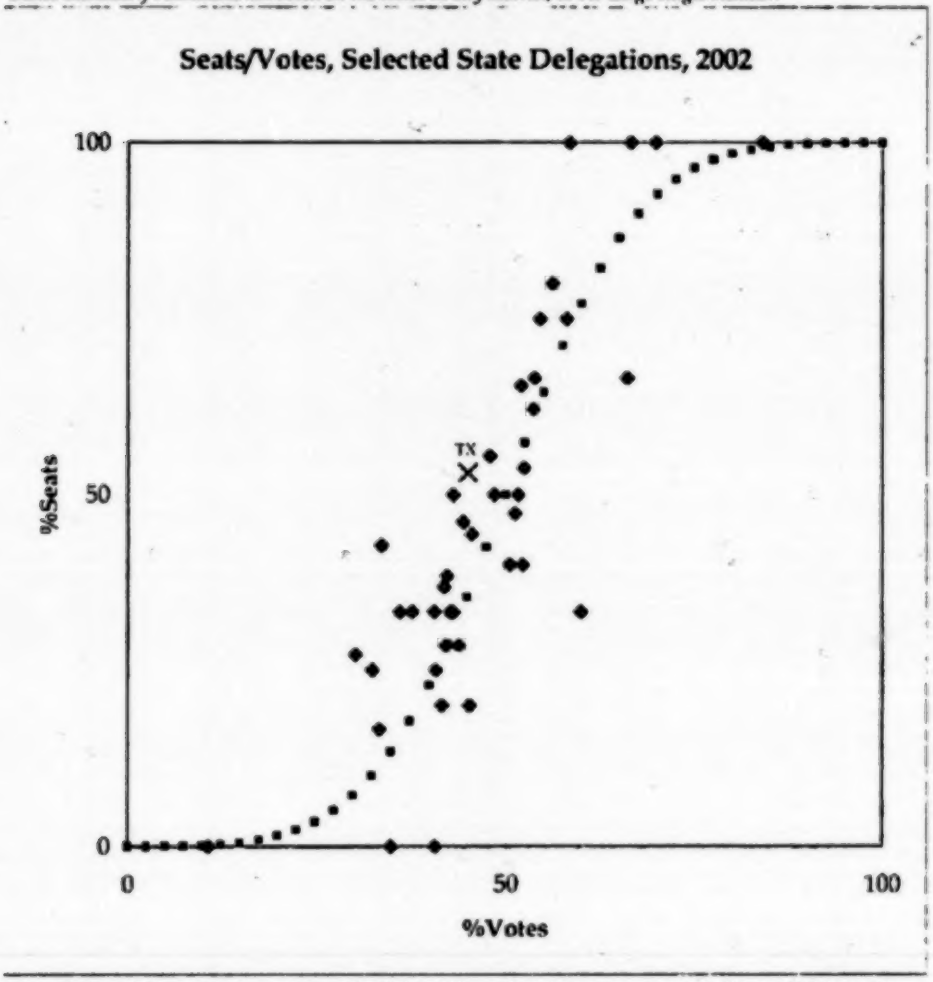
Sta	D% TotVote	D% TotSeats	D Seats	R Seats	D% MajVote	D% PlySeats	D S/V %Dif
AL	33.9	28.5	2	5	36.3	28.5	-21.5
AK	16.5	0.0	0	1	19.2	0.0	-100.0
AZ	38.0	16.6	1	5	39.4	16.6	-57.9
AR	n/a	75.0	3	1	n/a	75.0	n/a
CA	51.8	61.5	32	20	54.8	61.5	12.2
CO	30.5	33.3	2	4	33.8	33.3	-1.5
CT	53.2	50.0	3	3	54.0	50.0	-7.4
DE	30.8	0.0	0	1	31.3	0.0	-100.0
FL	39.4	34.7	8	15	40.9	34.7	-15.2
GA	37.9	27.2	3	8	37.9	27.2	-28.2
HI	65.0	100.0	2	0	66.6	100.0	50.2
ID	28.8	0.0	0	2	29.9	0.0	-100.0
IL	55.8	50.0	10	10	56.2	50.0	-11.0
IN	44.2	40.0	4	6	45.5	40.0	-12.1
IA	41.6	20.0	1	4	42.5	20.0	-52.9
KS	31.6	25.0	1	3	33.3	25.0	-24.9
KY	39.1	16.6	1	5	40.5	16.6	-59.0
LA	29.8	28.5	2	5	32.5	28.5	-12.3
ME	66.2	100.0	2	0	67.5	100.0	48.1
MD	55.1	50.0	4	4	55.3	50.0	-9.6
MA	84.3	100.0	10	0	85.1	100.0	17.5
MI	53.5	56.2	9	7	54.9	56.2	2.4
MN	52.2	62.5	5	3	55.4	62.5	12.8
MS	50.2	60.0	3	2	51.4	60.0	16.7
MO	48.8	44.4	4	5	50.0	44.4	-11.2
MT	46.2	0.0	0	1	47.3	0.0	-100.0
NE	26.0	0.0	0	3	26.7	0.0	-100.0
NV	38.4	50.0	1	1	40.4	50.0	23.8
NH	42.9	0.0	0	2	44.0	0.0	-100.0
NJ	51.2	53.8	7	6	52.5	53.8	2.5
NM	51.0	33.3	1	2	52.2	33.3	-36.2
NY	54.7	61.2	19	12	56.4	61.2	8.5
NC	42.9	41.6	5	7	44.0	41.6	-3.5
ND	52.9	100.0	1	0	54.3	100.0	84.2
OH	45.7	42.1	8	11	48.4	42.1	-13.0
OK	30.9	16.6	1	5	32.4	16.6	-48.8
OR	54.9	80.0	4	1	56.5	80.0	41.6
PA	50.0	47.6	10	11	50.5	47.6	-5.7
RI	64.4	100.0	2	0	73.4	100.0	36.2
SC	39.7	33.3	2	4	41.8	33.3	-20.3
SD	24.8	0.0	0	1	25.3	0.0	-100.0
TN	44.2	44.4	4	5	45.2	44.4	-1.8
TX	47.0	56.6	17	13	49.1	56.6	15.3
UT	40.1	33.3	1	2	41.6	33.3	-20.0
VT	0.0	0.0	0	0	0.0	n/a	n/a
VA	43.9	36.3	4	6	48.3	40.0	-17.2
WA	52.2	66.6	6	3	53.5	66.6	20.0
WV	72.5	66.6	2	1	79.4	66.6	-16.1
WI	47.4	55.5	5	4	47.5	55.5	16.8
WY	28.5	0.0	0	1	29.9	0.0	-100.0
Sum			212	221			

Appendix

Seats Won compared to Votes Received, State Delegations **Chart TX-52.**

Based upon the Major Party Vote for Congress for the DEMOCRATS Curve value is 3

States excluded if : candidate not listed on the ballot in any district, or At-Large single member.



Note: Each symbol represents one congressional delegation; selected states may be marked by an "X" (see p.2).

Appendix

Sta	D% TotVote	D% TotSeats	D Seats	R Seats	D% MajVote	D% PtySeats	D S/V %Dif
AL	40.0	28.5	2	5	42.2	28.5	-32.5
AK	17.3	0.0	0	1	18.8	0.0	-100.0
AZ	39.5	25.0	2	6	40.9	25.0	-38.9
AR	56.9	75.0	3	1	58.0	75.0	29.3
CA	51.4	62.2	33	20	53.6	62.2	16.0
CO	42.2	28.5	2	5	43.9	28.5	-35.1
CT	51.4	40.0	2	3	52.2	40.0	-23.4
DE	26.7	0.0	0	1	27.0	0.0	-100.0
FL	n/a	28.0	7	18	n/a	28.0	n/a
GA	42.4	38.4	5	8	42.4	38.4	-9.4
HI	64.5	100.0	2	0	66.5	100.0	50.4
ID	34.0	0.0	0	2	35.0	0.0	-100.0
IL	50.7	47.3	9	10	51.2	47.3	-7.6
IN	42.1	33.3	3	6	43.2	33.3	-22.9
IA	44.8	20.0	1	4	45.3	20.0	-55.8
KS	31.3	25.0	1	3	32.6	25.0	-23.3
KY	32.0	16.6	1	5	33.5	16.6	-50.4
LA	27.5	42.8	3	4	33.8	42.8	26.6
ME	58.4	100.0	2	0	58.4	100.0	71.2
MD	54.5	75.0	6	2	54.5	75.0	37.6
MA	83.4	100.0	10	0	84.0	100.0	19.0
MI	49.3	40.0	6	9	50.5	40.0	-20.8
MN	49.9	50.0	4	4	51.6	50.0	-3.1
MS	47.2	50.0	2	2	48.5	50.0	3.1
MO	44.7	44.4	4	5	45.6	44.4	-2.6
MT	32.6	0.0	0	1	33.5	0.0	-100.0
NE	9.8	0.0	0	3	10.8	0.0	-100.0
NV	34.2	33.3	1	2	36.2	33.3	-8.0
NH	39.7	0.0	0	2	40.8	0.0	-100.0
NJ	51.3	53.8	7	6	52.4	53.8	2.7
NM	58.9	33.3	1	2	59.9	33.3	-44.4
NY	50.3	65.5	19	10	52.0	65.5	26.0
NC	43.2	46.1	6	7	44.5	46.1	3.6
ND	52.4	100.0	1	0	52.4	100.0	90.8
OH	42.1	33.3	6	12	42.8	33.3	-22.2
OK	39.1	20.0	1	4	41.7	20.0	-52.0
OR	54.6	80.0	4	1	56.1	80.0	42.6
PA	40.7	36.8	7	12	42.0	36.8	-12.4
RI	68.4	100.0	2	0	69.8	100.0	43.3
SC	35.2	33.3	2	4	37.8	33.3	-11.9
SD	45.6	0.0	0	1	46.0	0.0	-100.0
TN	46.3	55.5	5	4	47.9	55.5	13.9
TX	43.8	53.1	17	15	45.1	53.1	17.7
UT	39.7	33.3	1	2	40.7	33.3	-18.2
VT	0.0	0.0	0	0	0.0	n/a	n/a
VA	29.3	27.2	3	8	30.4	27.2	-10.5
WA	52.1	66.6	6	3	53.8	66.6	23.8
WV	66.0	66.6	2	1	66.0	66.6	0.9
WI	41.4	50.0	4	4	43.2	50.0	15.7
WY	36.2	0.0	0	1	37.4	0.0	-100.0
Sums			205	229			

Appendix

Seats Won compared to Votes Received

Chart TX-71.
Curve value is 3

Votes based upon the Aggregate Congressional Totals for ALL STATES.
Source: House Clerk Biennial Reports.

Subtable 1. Vote Totals and Percentages

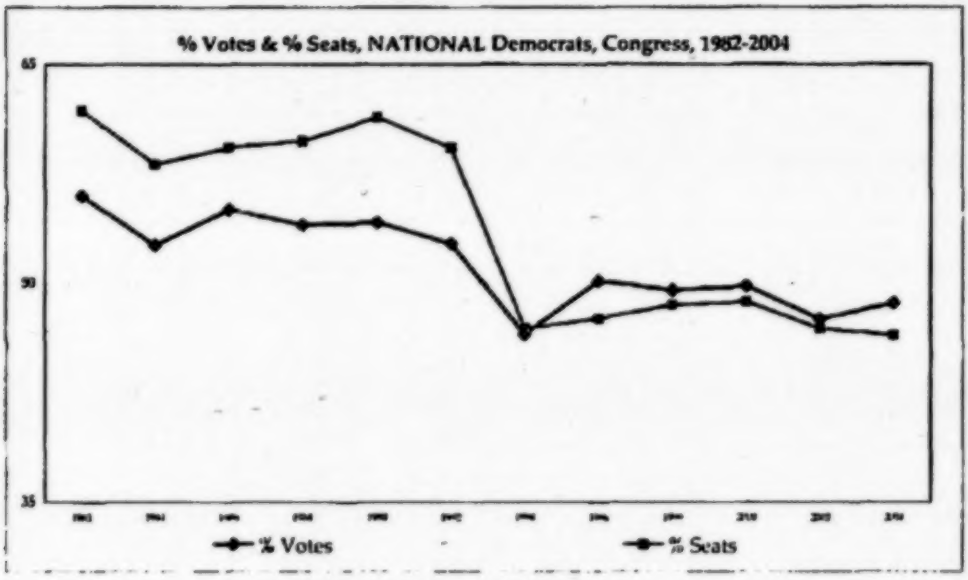
Year	Votes for Democrats	Votes for Republicans	Votes for All Others	Votes for All Candidates	Votes for Major Parties	% of All Votes Democrats	% of Maj. Pty. Democrats	% of All Votes Republicans	% of Maj. Pty. Republicans
1982	35,126,436	27,608,814	1,148,424	63,880,841	62,735,438	55.0	56.0	43.2	44.0
1984	42,799,060	30,540,762	1,082,016	82,421,838	81,339,822	51.9	52.6	46.8	47.4
1986	32,338,342	26,384,680	1,035,972	59,758,397	58,722,425	54.1	55.1	44.2	44.9
1988	43,473,080	37,015,851	1,193,254	81,682,185	80,488,931	53.2	54.0	45.3	46.0
1990	32,347,770	27,402,836	2,553,885	62,354,053	59,799,768	52.0	54.2	43.9	45.8
1992	48,550,096	43,499,815	5,150,215	97,198,316	92,048,111	49.9	52.7	44.8	47.3
1994	31,542,823	36,325,809	2,623,016	70,493,648	67,868,632	44.7	46.5	51.5	53.5
1996	43,393,550	43,120,872	3,719,015	90,233,467	86,514,452	48.1	50.2	47.8	49.8
1998	31,391,834	31,983,612	3,229,356	66,604,802	63,375,446	47.1	49.5	48.0	50.5
2000	46,411,559	46,750,175	5,630,229	98,799,963	93,161,734	47.0	49.8	47.3	50.2
2002	39,642,142	37,091,270	3,973,145	74,706,559	70,733,412	49.0	47.6	49.6	52.4
2004	52,745,121	55,713,412	4,753,753	113,192,286	108,438,533	44.6	48.6	49.2	51.4

Subtable 2. Percentage of Seats Expected based upon Seats-Votes Curve

Year	% of All Votes Democrats	Expected % Seats	% of Maj. Pty. Democrats	Expected % Seats	% of All Votes Republicans	Expected % Seats	% of Maj. Pty. Republicans	Expected % Seats
1982	55.0	64.6	56.0	67.3	43.2	30.6	44.0	32.7
1984	51.9	55.6	52.6	57.8	46.8	40.4	47.4	42.2
1986	54.1	62.1	55.1	64.8	44.2	33.1	44.9	35.2
1988	53.2	59.6	54.0	61.8	45.3	36.5	46.0	38.2
1990	52.0	55.9	54.2	62.3	43.9	32.3	45.8	37.7
1992	49.9	49.9	52.7	58.2	44.8	34.7	47.3	41.9
1994	44.7	34.7	46.5	39.6	51.5	54.6	53.5	60.4
1996	48.1	44.3	50.2	50.5	47.8	43.4	49.8	49.5
1998	47.1	41.3	49.5	48.6	48.0	44.1	50.5	51.4
2000	47.0	41.0	49.8	49.5	47.3	42.0	50.2	50.5
2002	45.0	35.5	47.6	42.7	49.6	49.0	52.4	57.3
2004	44.6	39.9	48.6	45.9	49.2	47.7	51.4	54.1

(Chart 1of3 on page 1)

Appendix



Year	D % Votes	D % Seats
1982	54.0	61.8
1984	52.6	58.2
1986	55.1	59.3
1988	54.0	59.0
1990	54.2	61.4
1992	52.7	59.3
1994	46.5	48.9
1996	50.2	47.6
1998	49.3	48.3
2000	49.8	48.7
2002	47.6	46.9
2004	48.6	46.4

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Appendix

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Supreme Court, U.S.
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(8) (8) (9) (8)

Nos. 05-204, 05-254, 05-276, and 05-439

In the Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
Appellants,
v.
RICK PERRY, *et al.*, Appellees.

TRAVIS COUNTY, *et al.*, Appellants,
v.
RICK PERRY, *et al.*, Appellees.

EDDIE JACKSON, *et al.*, Appellants,
v.
RICK PERRY, *et al.*, Appellees.

GI FORUM OF TEXAS, *et al.*, Appellants,
v.
RICK PERRY, *et al.*, Appellees.

On Appeal from the United States District Court for the Eastern District of Texas

BRIEF OF SAMUEL ISSACHAROFF, BURT NEUBORNE, AND RICHARD H. PILDES AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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INTEREST OF THE AMICI CURIAE

The individual *amici* are Professors of Law who have devoted much of their careers to the study of the law of democracy.[1] We believe that the near elimination of competitive congressional elections in recent redistrictings, caused by nationwide political gerrymandering by both major political parties, erodes one of the structural foundations of the Constitution: representative self-government through competitive elections that hold representatives accountable to voters. Until now, this Court has struggled to analyze the dysfunction caused by political gerrymandering as a potential violation of the Equal Protection Clause. We respectfully submit this brief *amici curiae* to invite the Court's attention to an alternative analytical approach premised on constitutional protection of the essential foundation of representative self-government: electoral accountability through competitive elections.

INTRODUCTION

For over 40 years, the Equal Protection Clause has served as the principal constitutional vehicle for intensive judicial involvement in protecting the right to vote and to run for office.[2] This Court's insistence on rigorous compliance with principles of formal electoral equality has provided — and continues to provide — an essential foundation for American democracy. In the last decade, however, it has become clear that formal political equality can co-exist with suppression of the single most important element of democratic self-

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored any part of this brief, and no one other than *amici* has made a monetary contribution to its preparation or submission, except for the assistance of Mayer, Brown, Rowe & Maw LLP in the formal production and filing of this brief.

[2] See *Kramer* v. *Union Free Sch. Dist.*, 395 U.S. 621 (1969); *Harper* v. *Va. Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Baker* v. *Carr*, 369 U.S. 186 (1962).

governance — competitive elections in which voters can hold their representatives electorally accountable.

When a state legislature designs a congressional apportionment that satisfies the formal mathematical norms of "one-person one-vote," but intentionally dispenses with competitive elections in virtually every congressional district — as in these appeals — the lens of formal equality fails to reveal the nature of the constitutional injury. Nor is that injury fully addressed in a search for a "fair" allocation of the political spoils between the political parties. Rather, the constitutional violation lies in the structural harm to representative self-government that results when state legislatures abuse their powers under the Elections Clause, Article I, § 4, and deliberately suppress competitive elections in systematic fashion.

To ensure that all elections are competitive is, of course, impossible. A natural political advantage enjoyed by one or another political faction in a geographical area may render election outcomes a foregone conclusion. Nothing in the Constitution or in democratic political theory guarantees a perennial political minority anything other than a fair chance to persuade the political majority and continued enjoyment of equal treatment under law. But as evident from the redistricting in this case — and the design of 90% of congressional districts nationwide — a lethal combination of modern technology, partisanship, and incumbent self-dealing renders it possible for state legislatures to assure that nearly all congressional elections are non-competitive.

Even as the parties dispute the distributional equity of one or another districting plan, the undeniable fact of modern political life is the virtual disappearance of competitive congressional elections. The post-redistricting elections in 2002 were the least competitive in American history: challengers defeated only four congressional incumbents. Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 POL. SCI. Q. 1, 10-11 (2003). More

than one-third of state congressional delegations did not change at all.[3] There were 338 incumbents who won by more than a 20-point margin, the generally accepted definition of a "landslide."[4] There were only 38 minimally competitive districts nationwide, using the generally accepted definition of less than a 10-point margin of victory (and even many of those districts were designed by commissions, not partisan legislatures).[5] These figures reflect a dramatic decline from previous decades in competitiveness.[6]

This lack of competitive elections for Congress does not reflect a dramatic sea change in the electorate's partisan preferences. While only one of eleven House elections was decided by less than ten percentage points, fully half of state governorships and Senate seats contested on the same day — in elections impervious to political gerrymandering — were instead competitive enough to be decided by less than this ten-point margin.[7] As one of the leading political science analysts of congressional elections puts it: "Redistricting patterns are a major reason for the dearth of competitive races in 2002 and help to explain why 2002 produced the smallest number of successful House challenges (four) of any general

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[3] These numbers were compiled from the following sources: CQ's POLITICS IN AMERICA 2004: THE 108TH CONGRESS (David Hawkings & Brian Nutting eds. 2003); MICHAEL BARONE & RICHARD E. COHEN, THE ALMANAC OF AMERICAN POLITICS 2004 (2003); Clerk of the House of Representatives, *Statistics of the Congressional Election of November 5, 2002* (2003), at http://clerk.house.gov/members/electionInfo/2002election.pdf ("*2002 Election Statistics*").

[4] See Table 1, *infra*.

[5] See CQ's POLITICS IN AMERICA 2004, *supra*. On the effects of commission rather than legislative redistricting, see pages 17-18, *infra*.

[6] See Table 1, *infra*.

[7] Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 183 (2003) (assembling statistics).

election in U.S. history." Jacobson, *supra*, 118 POL. SCI. Q. at 10-11.

The virtual elimination of competitive congressional elections is no accident. State legislatures have orchestrated this disappearance using two forms of political gerrymandering. The first is the partisan gerrymander, such as the Texas plan before the Court, in which a faction with transitory dominance draws district lines to maximize its party's political advantage at the expense of the minority party. The second kind is the "sweetheart," bipartisan gerrymander, in which the two major parties work as a cartel and risk-aversely agree to allocate political representation to protect as many incumbents as possible.[8] Common to each form is intentional state legislative action to minimize the risk of competitive elections or eliminate that risk altogether. These tactics are effective. Even during the decades of gross malapportionment, disfranchisement, and a virtual Democratic Party monopoly on political power in the South, incumbents still lost 10-11% of the time on average during, for example, the 1930s and 1940s — as compared to 1.8% in the 2000s so far.[9]

None of the equal-protection arguments about the partisan implications of one or another districting plan captures the full insult to the constitutional commitment of electoral accountability that state legislative creation of overwhelmingly "safe" congressional districts entails. In California, for example, not a single challenger in the 2002 congressional general election received over 40% of the vote. *Id.* at 182. Political actors facing such an absence of electoral competi-

---

[8] Experts characterize California, New York, Illinois, and Ohio (with a combined total of 119 seats) as having adopted bipartisan gerrymanders in which nearly all seats were protected, though both California (Democratic) and Ohio (Republican) were nominally under unified party control. Barone & Cohen, *supra*, at 44.

[9] HAROLD W. STANLEY & RICHARD G. NIEMI, VITAL STATISTICS ON AMERICAN POLITICS 2005-2006 47 (2006) (Table 1-14).